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THE PEOPLE OF THE STATE OF ILLINOIS
for Use of IDA SLAVIK, BERTHA DICUS
and EMMA DICUS, Conservatrices of
Estate of Louis Scherer, Incompetent,
Appellants,

vs.

UNITED STATES FIDELITY AND GUARANTY
COMPANY and JOHN B. DICUS,
Appellees.

12/60
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APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

287 I.A. 611¹

MR. PRESIDING JUSTICE MATCHETT
DELIVERED THE OPINION OF THE COURT.

Henry Scherer, a resident of Chicago, Cook county, Illinois, died October 28, 1925, leaving him surviving three daughters, Emma, Bertha and Ida, and one son, Louis, who was mentally defective, as his only heirs at law and next of kin. He left a purported will naming the Central Trust Company, a corporation, executor. A bill was filed in the Superior court to contest this will. A decree was entered setting aside the will and directing that the administration of the estate should be transferred to the Superior court. The three daughters, Emma, Bertha and Ida, were appointed by the Probate court conservatrices of the estate of their incompetent brother Louis. John G. Purkel was appointed guardian ad litem for Louis Scherer, and John B. Dicus, defendant, was duly appointed administrator of the estate of Henry Scherer. April 8, 1929, John B. Dicus filed his bond as such administrator, which was approved by the Superior court of Cook county.

April 29, 1929, an order was entered by the Superior court upon petition of the administrator directing the administrator to turn over to the sister conservatrices of Louis Scherer 41 shares of the stock of the Central Trust Company of Illinois, a bank and corporation, and 375 shares of the common stock of the Illinois Brick Company, a corporation. This same order provided that the administrator should retain real estate bonds and mortgages of ^{or} the value of \$62,000, estimated to be sufficient to pay claims

THE PEOPLE OF THE STATE OF ILLINOIS
for Use of IDA SLAVIK, BETTIE DIGNS
and EMMA DIGNS, Conservators of
Estate of Louis Scherer, Incompetent,
Appellants,

vs.

UNITED STATES FIDELITY AND GUARANTY
COMPANY and JOHN B. DIGNS,
Appellees.

COURT OF CHICAGO.

MR. PRESIDING JUSTICE MARSHALL

DELIVERED THE OPINION OF THE COURT.

Henry Scherer, a resident of Chicago, Cook county, Illinois, died October 28, 1925, leaving him surviving three daughters, Emma, Bettie and Ida, and one son, Louis, who was mentally defective, as his only heirs at law and next of kin. He left a purported will naming the Central Trust Company, a corporation, executor. A bill was filed in the Superior court to contest this will. A decree was entered setting aside the will and directing that the administration of the estate should be transferred to the Superior court. The three daughters, Emma, Bettie and Ida, were appointed by the Probate court conservators of the estate of their incompetent brother Louis. John G. Parker was appointed guardian of the person for Louis Scherer, and John B. Digns, defendant, was duly appointed administrator of the estate of Henry Scherer. April 5, 1929, John B. Digns filed his bond as such administrator, which was approved by the Superior court of Cook county. April 29, 1929, an order was entered by the Superior court upon petition of the administrator directing the administrator to turn over to the state conservators of Louis Scherer all shares of the stock of the Central Trust Company of Illinois, a bank and corporation, and 375 shares of the common stock of the Illinois Brick Company, a corporation. This same order provided that the administrator should retain real estate bonds and mortgages of the value of \$29,000, estimated to be sufficient to pay claims

388 I.A. 611

incurred in the course of the administration of the estate.

This suit is on the bond of John B. Dicus, administrator, for damages averred to have been sustained on account of the failure of John B. Dicus to comply with said order of April 29, 1929.

Defendants by their affidavit of merits filed December 7, 1935, averred that immediately upon the entry of the order of April 29, 1929, the administrator offered to deliver to plaintiffs the distributive share of Louis Scherer as provided for in the order, but plaintiffs requested the administrator to retain the Central Trust company stock so that he could exercise an option to purchase new stock, according to certain rights which had been given to stockholders thereof by the Central Trust Company; that on May 15, 1929, plaintiffs stated to defendant Dicus that the market price of the stock in the Brick company was low and requested him to hold it for a higher price and never thereafter requested or demanded delivery of the same.

The issues were submitted to a jury, which returned a verdict in favor of defendants, upon which the court, overruling motions of plaintiffs for a new trial and for judgment notwithstanding the verdict, entered judgment upon the said verdict as returned. From that judgment plaintiffs appeal.

Plaintiffs contend that under the evidence they were, as a matter of law, entitled to recover; that a motion made by them at the close of all the evidence for a directed verdict in their favor and a similar motion that judgment be entered in their favor, notwithstanding the verdict, should have been granted.

The material facts, as we view them, are practically undisputed with the exception that testimony of defendant to conversations with plaintiffs Emma Dicus and Ida Slavik after the entry of the order of April 29, 1929, in which he says he offered to deliver the

incurred in the course of the administration of the estate.

This suit is on the bond of John D. Dicks, administrator.

For damages averred to have been sustained on account of the

Talano of John D. Dicks to comply with said order of April 23, 1932.

Defendants by their affidavit of merits filed December 7,

1932, averred that immediately upon the entry of the order of April

23, 1932, the administrator offered to deliver to plaintiffs the

distributive share of Louis Dicks as provided for in the order,

but plaintiffs requested the administrator to retain the Central

Trust company stock so that he could exercise an option to purchase

new stock, according to certain rights which had been given to

stockholders thereof by the Central Trust Company; that on May 15,

1932, plaintiffs stated to defendant Dicks that the market price

of the stock in the Brick company was low and requested him to hold

it for a higher price and never thereafter requested or demanded

delivery of the same.

The issues were submitted to a jury, which returned a verdict

in favor of defendants, upon which the court, overruling motions of

plaintiffs for a new trial and for judgment notwithstanding the

verdict, entered judgment upon the said verdict as returned. From

that judgment plaintiffs appeal.

Plaintiffs contend that under the evidence they were, as a

matter of law, entitled to recover; that a motion made by them at

the close of all the evidence for a directed verdict in their favor

and a similar motion that judgment be entered in their favor, not-

withstanding the verdict, should have been granted.

The material facts, as we view them, are practically undis-

puted with the exception that testimony of defendant to conversation

with plaintiffs Emma Dicks and Ida Dicks after the entry of the

order of April 23, 1932, in which he says he offered to deliver the

stocks to them and they declined to receive them, were denied by these plaintiffs. That issue has been submitted to the jury with a verdict for defendant. All the circumstances in evidence corroborate, we think, the testimony of defendants as to these conversations.

The uncontradicted evidence tends to show that defendant John B. Dicus is a dentist practicing his profession in Chicago; that Emma Dicus, one of the daughters and heirs at law of Henry Scherer, is married to W. O. Dicus, a brother of defendant John B. Dicus; that John B. Dicus is married to Bertha Dicus, a sister of Emma and Ida and daughter of Henry Scherer. Henry Scherer died October 28, 1925, leaving a substantial estate. Pending the contest of his will, the Central Trust Company was appointed administrator and after the alleged will was decreed to be invalid about April 8, 1929, John B. Dicus was appointed administrator of the estate. The assets of the estate received by John B. Dicus included 167 shares of the stock of the Central Trust Company, which was represented by five certificates for 25 shares each and one certificate for 42 shares. These certificates were made out in the name of the Central Trust Company of Illinois as administrator of the estate.

Defendant John B. Dicus also received 1500 shares of the common stock of the Illinois Brick Company. Some of the shares were issued in the name of Henry Scherer, others which had been issued as stock dividends were in the name of the Central Trust Company of Illinois. This stock was received by defendant April 12, 1929.

The order of April 29 in the Superior court was entered upon the petition of defendant John B. Dicus as administrator, but the three sisters joined in the petition and, as a matter of fact, O. K.'d the order. It was also O. K.'d by the guardian ad litem of

stocks to them and they declined to receive them, were denied by these plaintiffs. That issue has been submitted to the jury with a verdict for defendant. All the circumstances in evidence corroborate, we think, the testimony of defendants as to these conversations.

The uncontradicted evidence tends to show that defendant John E. Dixon is a dentist practicing his profession in Chicago; that Emma Dixon, one of the daughters and heirs at law of Henry Scherer, is married to W. O. Dixon, a brother of defendant John E. Dixon; that John E. Dixon is married to Gertrude Dixon, a sister of Emma and Ida and daughter of Henry Scherer. Henry Scherer died October 26, 1925, leaving a substantial estate. Pending the contest of his will, the Central Trust Company was appointed administrator and after the alleged will was decreed to be invalid about April 8, 1929, John E. Dixon was appointed administrator of the estate. The assets of the estate received by John E. Dixon included 127 shares of the stock of the Central Trust Company, which was represented by five certificates for 25 shares each and one certificate for 42 shares. These certificates were made out in the name of the Central Trust Company of Illinois as administrator of the estate.

Defendant John E. Dixon also received 1300 shares of the common stock of the Illinois Brick Company. Some of the shares were issued in the name of Henry Scherer, others which had been issued as stock dividends were in the name of the Central Trust Company of Illinois. This stock was received by defendant April 12, 1929.

The order of April 29 in the superior court was entered upon the petition of defendant John E. Dixon as administrator, but the three also joined in the petition and, as a matter of fact, O. E. A. and order. It was also O. E. A. by the guardian ad litem of

Louis Scherer, the incompetent. On this date the Central Trust company stock was worth on the market about \$600 a share. May 27th of the same year it sold for \$697.25 a share. In the meantime came the depression, and at the time of the trial the Bank stock was without value. The Illinois Brick company stock at the time of the entry of the order was worth from \$32 to \$33.50 a share. Francis M. Lowes was attorney for the estate, and he prepared the petition of the administrator praying the entry of the order of April 29. Neither the Central Trust Company of Illinois stock nor the Brick company stock was ever delivered to the conservatrices as provided for in this order. As a matter of fact, John B. Dicus as administrator held the stock until January 25, 1935, at which time he delivered it to Walker Butler, who had been appointed his successor as administrator of the estate.

As already stated, John B. Dicus testified that he offered to deliver the stock to the conservatrices and that they requested him to hold it. They denied this, but they do not testify that they or any one of them at any time made any demand on him that he turn the stock over to them, nor do they testify to any facts tending to show any improper use of the stock for the personal benefit of the administrator or any fraud by him in connection therewith. No selfish or improper motive for withholding the stock appears from the evidence. Bertha Dicus, one of the parties plaintiff, was joined in this suit against her husband without her knowledge or consent, and she has apparently taken no part in it. The evidence shows that at the time of the entry of the order of April 29, and for a long time thereafter the family was entirely harmonious with reference to matters connected with this estate. Each of the sisters was taking care of their incompetent brother in turns of eight weeks. Emma Dicus talked with defendant administrator about an allowance of \$50 a week being made to her for taking care of the

allowance of \$50 a week being made for taking care of the weeks. Thomas Dicus failed with defendant administrator about an allowance of \$50 a week being made for taking care of the reference to matters connected with this estate. Each of the sisters for a long time thereafter the family was entirely harmonious with shows that at the time of the entry of the order of April 29, and consent, and she has apparently taken no part in it. The evidence joined in this suit against her husband without her knowledge or the evidence. Bertha Dicus, one of the parties plaintiff, was No selfish or improper motive for withholding the stock appears from of the administrator or any friend by him in connection therewith. ing to show any improper use of the stock for the personal benefit turn the stock over to them, nor do they testify to any facts tending they or any one of them at any time made any demand on him that he him to hold it. They denied this, but they do not testify that to deliver the stock to the conservators and that they requested As already stated, John B. Dicus testified that he offered as administrator of the estate.

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brother. The defendant administrator told her that he would take the matter up with the attorney for the estate and the other interested parties and see if the allowance might not be made. It was at this time, he says, that he told her he was ready to deliver the stock to each of them. Ida Slavik owed the estate some \$7000 and the matter of taking care of this obligation was taken up, and he told her he thought an arrangement could be made to take care of that; he says he also told Ida at that time that he was ready to deliver the stock, but that Ida suggested to him that there were rumors of stock rights to be issued in connection with the Central Trust Company of Illinois stock, and that if the money of Louis was used up he would not be able to take advantage of these rights; that she thought the stock should remain in the estate. As a matter of fact, on June 11, 1929, the administrator turned in the old certificates and secured new ones therefor. Emma and Ida both went to Fond du Lac where they remained during June, July and August of that year. While they were there a petition was prepared by Mr. Lowes in behalf of Emma Dicus, Bertha Dicus, Ida Slavik and Louis Scherer by John G. E. Puerkel as guardian ad litem and John B. Dicus as administrator. This petition recited the material facts with reference to the estate and stated that on July 12, 1929, a special meeting of the stockholders of the Central Trust Company had voted to issue rights for each share of stock held; that for each seven rights so held the holder was entitled to buy one share of stock at \$350 a share, for which warrants were issued on July 12; that the right to purchase must be exercised before 3 o'clock p. m. July 31, 1929; that each of them believed it would be advantageous to the estate of Henry Scherer to purchase the 24 additional shares to which the estate was entitled under these rights, and pay for them out of the money then in the hands of the administrator; that he had sufficient funds to purchase such shares. The petition

brother. The defendant administrator told her that he would take the matter up with the attorney for the estate and the other interested parties and see if the stock could be made. It was at this time, he says, that he told her he was ready to deliver the stock to each of them. Ida Alvik owed the estate some \$7000 and the matter of taking care of this obligation was taken up, and he told her he thought an arrangement could be made to take care of that; he says he also told Ida at that time that he was ready to deliver the stock, but that Ida suggested to him that there were rumors of stock rights to be issued in connection with the Central Trust Company of Illinois stock, and that if the money of Louis was used up he would not be able to take advantage of these rights; that she thought the stock should remain in the estate. A matter of fact, on June 11, 1921, the administrator turned in the old certificates and secured new ones therefor. Emma and Ida both went to Fond du Lac where they remained during June, July and August of that year. While they were there a petition was prepared by Mr. Lowe in behalf of Emma Diers, Bertha Diers, Ida Alvik and Louis Scherer by John A. M. Farnkel as guardian ad litem and John B. Diers as administrator. This petition recited the material facts with reference to the estate and stated that on July 12, 1920 a special meeting of the stockholders of the Central Trust Company had voted to issue rights for each share of stock held; that for each seven rights so held the holder was entitled to buy one share of stock at \$250 a share, for which warrants were issued on July 12, 1921; that the right to purchase must be exercised before 3 o'clock p. m. July 31, 1921; that each of them believed it would be advantageous to the estate if Henry Scherer to purchase the 24 additional shares to which the estate was entitled under these rights, and pay for them out of the money then in the hands of the administrator; that he had sufficient funds to purchase such shares. The petition

prayed that an order authorizing the administrator so to do be entered. This petition was forwarded to Emma Dicus and Ida Slavik at Fond du Lac and was subscribed by them there, and on July 29, 1929, the Superior Court of Cook county entered an order authorizing the administrator so to do. August 27, 1929, John B. Dicus as administrator presented a petition to the Superior court which recited that the complainants, individually and as conservators of Louis Scherer, consented to the granting of the prayer of the petition. The order authorized the administrator to sell the 191 shares of the Central Trust Company stock belonging to the estate for not less than \$690 a share; that complainants consented to this order is apparent from the fact that they duly filed in the Probate court of Cook county in the matter of the Estate of Louis Scherer a petition in which they state that as conservators of said estate they had consented to the order of the Superior court authorizing the sale of said stock and prayed that an order be entered approving and ratifying their consent theretofore given. This petition was verified by Ida Slavik, Emma Dicus and Bertha Dicus on September 3, 1929, and on that day the Probate court entered an order approving and confirming the action of the conservatrices in consenting to such sale.

The friendly relations which existed between the parties is illustrated by a letter by Emma Dicus dated July 29, 1929, at Fond du Lac, Wisconsin, in which she addresses defendant and his wife as "Dear John and Bertha" and gives them an urgent invitation to come to Fond du Lac where "we are alone and can have a Dicus reunion." The letter ends, "Love to all, Bye Bye. More later. Be sure to come, Lovingly, Emma."

How or when this cordial relationship ended the record does not disclose. We find difficulty in apprehending the theory upon which the plaintiffs undertake to maintain this suit. The

prayed that an order authorizing the administrator so to do be entered. This petition was forwarded to Emma Dixon and Ida Slavik at Fond du Lac and was subscribed by them there, and on July 29, 1922, the Superior Court of Cook County entered an order authorizing the administrator so to do. August 27, 1922, John L. Dixon as administrator presented a petition to the Superior Court which recited that the complainants, individually and as conservators of Louis Scherer, consented to the granting of the prayer of the petition. The order authorized the administrator to sell the 191 shares of the Central Trust Company stock belonging to the estate for not less than \$600 a share; that complainants consented to this order is apparent from the fact that they duly filed in the Probate Court of Cook County in the matter of the Estate of Louis Scherer a petition in which they state that as conservators of said estate they had consented to the order of the Superior Court authorizing the sale of said stock and prayed that an order be entered approving and ratifying their consent thereto. This petition was verified by Ida Slavik, Emma Dixon and Bertha Dixon on September 3, 1922, and on that day the Probate Court entered an order approving and confirming the action of the conservators in consenting to such sale.

The friendly relations which existed between the parties is illustrated by a letter by Emma Dixon dated July 29, 1922, at Fond du Lac, Wisconsin, in which she addresses defendant and his wife as "Dear John and Bertha" and gives them an urgent invitation to come to Fond du Lac where "we are alone and can have a Dixon reunion." The letter ends, "Love to all, bye bye. Love later. Be sure to come, lovingly, Emma."

Now or when this cordial relationship ended the record does not disclose. We find difficulty in apprehending the theory upon which the plaintiff's master sought to maintain this suit. The

statement of claim, amended many times, avers that the administrator breached the bond in failing and neglecting to turn over the stock or the value thereof on April 29, 1929. To their claim that defendants are liable as a matter of law they cite Housh v. People, 66 Ill. 178; Salomon v. People, 191 Ill. 290; McDonald v. People, 222 Ill. 325; and Haskins v. Martin, 103 Ill. App. 115, all of which are so clearly distinguishable as to make discussion of them unnecessary. The whole record here tends to show the defendant was at all times willing and able to deliver and that delivery was postponed for the convenience or at the request of the plaintiffs, or some of them. While the evidence is in conflict as to some of the conversations, in effect the verdict of the jury is that plaintiffs did request postponement and no person can, we think, reasonably draw any other inference from the testimony of the witnesses and all the facts and circumstances appearing in the evidence. Plaintiffs cite no cases and we do not believe a case can be found in the books where a party entirely willing and able to deliver under such an order, who postpones such delivery for the convenience and at the request of the parties who are to receive, has been held liable in an action for conversion or for negligence. Indeed, if there is negligence here, it is on the part of the conservatrices upon whom primarily rested the duty of taking the property of and caring for the estate of the incompetent brother. Not the administrator, but they were his keepers and guardians, and the duty was primarily upon them. Bond vs. Lockwood, 33 Ill. 220; Cheney v. Roodhouse, 135 Ill. 257.

Plaintiffs do not argue that the verdict is against the weight of the evidence. On the contrary, they ask this court to hold as a matter of law that defendants are liable for the failure of the administrator to comply with the technical terms of an order which was in their favor and compliance with which the uncontradicted

statement of claim, amended many times, avers that the administrator
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68 Ill. 178; Salomon v. People, 101 Ill. 290; McDonald v. People,
323 Ill. 325; and Haskins v. Martin, 103 Ill. app. 115, all of
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Plaintiffs do not argue that the verdict is against the
weight of the evidence. On the contrary, they ask this court to
hold as a matter of law that defendants are liable for the failure
of the administrator to comply with the technical terms of an order
which was in their favor and compliance with which the administrator

evidence shows they waived and which (on conflicting evidence) it had been found by the jury, they prevented.

It is urged that the court erred in admitting over objection evidence of these conversations between plaintiff and the defendant Dicus as to carrying out the order of June 29. This contention is made upon the theory that the conservatrices are not the agents of their ward and could not bind his estate by their agreements. Plaintiffs cite Reams v. Taylor, 31 Utah, 288; McCarthy v. Jacobs, 288 Ill. 568, and many similar cases. The cases are not applicable. These conversations were not received for the purpose of establishing a contract between the incompetent and the defendant administrator, and this is not an attempt to bind the estate of the incompetent by any such contract. On the contrary this estate sues defendant Dicus for alleged negligence or default, and under such circumstances all the facts and circumstances material and bearing upon that issue were admissible as a part of the whole transaction upon which it was claimed the defendants were liable.

It is urged that the instructions were erroneous in that the court told the jury that if plaintiffs had themselves prevented delivery of the stocks they could not recover. We think the evidence justified these instructions.

It is also urged that the court erred in not granting plaintiffs' motion for a new trial upon the ground that newly discovered evidence showed that the administrator testified incorrectly with reference to the time when payment of the inheritance tax against the estate was made. There was an affidavit by one of the attorneys concerning this fact, which did not, however, directly contradict plaintiffs' evidence. At any rate the time of payment of the inheritance tax was not material or controlling.

The judgment entered upon the verdict of the jury is right and it is affirmed.

AFFIRMED.

O'Connor and McSurely, JJ., concur.

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defendant Dixon as to carrying out the order of June 29. This

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agreements. Plaintiffs cite Rogers v. Taylor, 21 Utah, 280; Mc-

Guthney v. Jacobs, 288 Ill. 268, and many similar cases. The

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and the defendant administrator, and this is not an attempt to

bind the estate of the incompetent by any such contract. On the

contrary this estate asks defendant Dixon for alleged negligence

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the estate was made. There was an affidavit by one of the attorneys

concerning this fact, which did not, however, directly contradict

plaintiffs' evidence. At any rate the time of payment of the in-

heritance tax was not material or controlling.

The judgment entered upon the verdict of the jury is right

and it is affirmed.

APPROVED.

O'Connor and McGurely, JJ., concur.

38782

EMMA DICUS, IDA SLAVIK and BERTHA
M. DICUS, Conservatrices of the
Estate of LOUIS SCHERER, Incompetent,
Appellee,

vs.

JOHN B. DICUS and UNITED STATES
FIDELITY AND GUARANTY COMPANY,
a Corporation,
Appellants.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

287 I.A. 611²

MR. PRESIDING JUSTICE MATCHETT
DELIVERED THE OPINION OF THE COURT.

This is an appeal by John B. Dicus, administrator of the Estate of Henry Scherer, from an order entered October 3, 1935, by the Municipal court of Chicago, in a case wherein Emma Dicus, Ida Slavik and Bertha Dicus, as conservatrices of the Estate of Louis Scherer, incompetent, were plaintiffs and the United States Fidelity and Guaranty Company, a corporation, and John B. Dicus were defendants.

The order was entered upon the motion of the conservatrices plaintiffs and directed that the half sheet and record in the case should be corrected so as to show the filing of plaintiffs' Notice of Appeal on July 13, 1935, as originally stamped on the half sheet by the clerk, instead of July 12, 1935, as subsequently altered in ink, and directing the clerk to change the notation on the half sheet accordingly. The order further, on motion of plaintiffs, gave plaintiffs leave to restore a lost portion of the files, namely, plaintiffs' Notice of Appeal "heretofore filed herein on July 13, 1935," etc.

The importance of the change in date from July 12, 1935, to July 13, 1935, arose out of the fact that if the Notice of Appeal was filed in the clerk's office on July 12, then the report of proceedings of the trial, which was not presented to the trial court until September 11, 1935, was not filed or presented within

38752

EMMA DICUS, IDA GLAVIK and BERTHA
M. DICUS, Conservators of the
Estate of LOUIS SCHERER, incompetent,
Appellees,

vs.

JOHN B. DICUS and UNITED STATES
FIDELITY AND GUARANTY COMPANY,
a Corporation,
Appellants.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

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MR. PRESIDING JUSTICE MATTHEW
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Estate of Henry Scherer, from an order entered October 5, 1935, by
the Municipal Court of Chicago, in a case wherein Emma Dicus, Ida
Glavik and Bertha Dicus, as conservators of the Estate of Louis
Scherer, incompetent, were plaintiffs and the United States Fidelity
and Guaranty Company, a corporation, and John B. Dicus were defend-
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The order was entered upon the motion of the conservators
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gave plaintiffs leave to restore a lost portion of the file,
namely, plaintiffs' Notice of Appeal. Thereafter filed herein on
July 13, 1935, "etc."

The importance of the change in date from July 12, 1935,
to July 13, 1935, arose out of the fact that at the time of
Appeal was filed in the clerk's office on July 12, then the report
of proceedings of the trial, which was not presented to the trial
court until September 11, 1935, was not filed or presented within

sixty days after the filing of Notice of Appeal as provided in paragraph 1 of subparagraph C of Rule 36 of the Supreme court. September 11, 1935, was 61 days after July 12, 1935. There had been no order entered extending the time for filing the Report of Proceedings, and, therefore, if the Notice of Appeal was filed July 12, 1935, a motion to strike it would probably have been granted.

Plaintiffs contend that the order was not a final and appealable order within the meaning of Section 77 of the Civil Practice Act, Illinois State Bar Stats. 1935, chapter 110, page 2449, and say that since the court found that plaintiffs' Notice of Appeal was originally stamped on the half sheet as having been filed July 13, 1935, and had been thereafter altered with pen and ink, there were matters of record from which the court could properly correct the record.

One phase of this cause was before the Third division of this court in a proceeding by way of mandamus to compel the Judge of the trial court to expunge from the record an order dismissing the appeal of plaintiffs and to settle and sign a report of proceedings. That petition was heard by the Third division of this court at the October Term 1934, and an opinion was filed December 23, 1935, directing that the order be expunged and writ of mandamus awarded - People of the State of Illinois for the Use of Ida Slavik et al., Appellant, vs. United States Fidelity and Guaranty Company and John B. Dicus, Appellees, 283 Ill. App. 627. The appeal of plaintiffs was thereafter filed in this court. The record included the Report of Proceedings. It has been considered on its merits and an opinion this day filed which affirms the judgment of the trial court. Plaintiffs have therefore secured the advantage of their appeal and the defendants of the judgment in their favor. The questions now discussed are mere moot questions which will not be further considered by the court. The appeal of the defendant will be dismissed.

APPEAL DISMISSED.

O'Connor and McSurely, JJ., concur.

sixty days after the filing of notice of appeal as provided in paragraph 1 of subparagraph C of Rule 36 of the Supreme Court. September 11, 1935, was 61 days after July 12, 1935. There had been no order entered extending the time for filing the report of Proceedings, and, therefore, if the notice of appeal was filed July 12, 1935, a motion to strike it would probably have been granted.

Plaintiff's content that the order was not a final and appealable order within the meaning of Section 17 of the Civil Practice Act, Illinois State Bar Association, Chapter 110, page 2449, and say that since the court found that plaintiff's notice of appeal was originally stamped on the half sheet as having been filed July 12, 1935, and had been thereafter altered with pen and ink, there were matters of record from which the court could properly correct the record.

One phase of this cause was before the Third division of this court in a proceeding by way of mandamus to compel the taking of the trial court to expunge from the record an order dismissing the appeal of plaintiff and to settle and sign a report of proceedings. That petition was heard by the Third division of this court at the October Term 1934, and an opinion was filed December 23, 1935, directing that the order be expunged and a new one awarded - People of the State of Illinois for the use of Ida J. Javik et al., Appellant, vs. United States Fidelity and Guaranty Company and John B. Javik, Appellees, 23 Ill. App. 2d. The appeal of plaintiff was thereafter filed in this court. The record included the Report of Proceedings. It has been considered on its merits and an opinion this day filed which affords the plaintiff the trial court. Plaintiff's have previously secured the advantage of their appeal and the defendants of the judgment in their favor. The questions now discussed are mere moot questions which will not be further considered by the court. The appeal of the defendant will be dismissed.

38864

FLORENCE UHLIG,
Appellee,

vs./

JOHN HANCOCK MUTUAL LIFE INSURANCE
COMPANY, a Corporation,
Appellant.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

287 I.A. 611³

MR. JUSTICE MCSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit seeking to recover as beneficiary the double indemnity provided for in four life insurance policies issued by defendant on the life of her husband, George A. Uhlig; the face amount of the policies had been paid and by this suit plaintiff sought to recover the additional amount, alleging that the insured died as the result of an accident; upon trial she had a verdict for \$1342; judgment was entered and defendant appeals.

The complaint alleged that the policies contained provisions that upon receipt of due proof that the insured has sustained bodily injury solely through external, violent and accidental means, resulting in the death of the insured within ninety days from the date of such bodily injury, the company will pay an additional amount equal to the face amount of the insurance stated in each policy; that the insured died November 28, 1933, through bodily injuries sustained solely through external, violent and accidental means; that October 11, 1933, he fell down the stairs on the premises occupied by him as a tenant, receiving injuries which proximately caused his death on November 28th.

Defendant denied that the death of the insured was caused by such injuries, denied that the fall down the stairs caused the death of the insured, and alleged that his death was caused by heart trouble and not on account of any bodily injuries received solely through external, violent and accidental means.

The insured on the day of his death was working for

32064

FLORIANCE UNLIG,

Applicant,

vs.

JAMES HANCOCK MUTUAL LIFE INSURANCE
COMPANY, a Corporation,
Respondent.

A Petition for Writ of Habeas Corpus
for Writ of Habeas Corpus.

287 I.A. 611

MR. JUSTICE HAS REPLY DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit seeking to recover as beneficiary the double indemnity provided for in four life insurance policies issued by defendant on the life of her husband, George A. Unlig; the face amount of the policies had been paid and by this suit plaintiff sought to recover the additional amount, alleging that the insured died as the result of an accident; upon trial the jury a verdict for \$1500; judgment was entered and defendant appeals. The complaint alleged that the policies contained provisions that upon receipt of the proceeds that the insured has sustained bodily injury solely through external, violent and accidental means, resulting in the death of the insured within ninety days from the date of such bodily injury, the company will pay an additional amount equal to the face amount of the insurance stated in each policy; that the insured died November 11, 1933, through bodily injuries sustained solely through external, violent and accidental means; that October 11, 1933, he fell from the stairs on the premises occupied by him as a tenant, receiving injuries which proximately caused his death on November 11, 1933. Defendant denied that the death of the insured was caused by such injuries, denied that he fell from the stairs caused the death of the insured, and alleged that his death was caused by his trouble and not on account of any bodily injuries received solely through external, violent and accidental means. The insured on the day of his death was entitled for

Westerlin & Campbell Company, removing a refrigerating continuous coil about 30 or 35 feet long, out of a room to be placed upon a truck; eight men, including the insured, were handling the coil; they were resting just before placing it on the truck, when suddenly the insured collapsed and fell down; a Dr. Munson was summoned who came about ten minutes later and pronounced him dead; this Doctor testified that in his opinion "internal organic trouble caused his death. I mean by that, that was not an accidental death"; that the body, particularly the face and head, was very much congested, bluish, red, and that this indicated that death was due either to apoplexy or a heart condition.

There was also ⁱⁿ evidence proceedings brought by plaintiff against the insured's employer, in which plaintiff signed and filed before the Industrial Commission of Illinois a claim for compensation in which it was stated that George Uhlig "was killed in an accident" and had died of heart disease. This claim was compromised by the payment by the employer to plaintiff of \$200 in a lump sum. Under the terms of the settlement it was stated that the employer denied that the deceased had any accident, but that "Deceased died of organic heart disease, as per doctor's report and death certificate attached," and that the widow (plaintiff here) had agreed to accept this lump sum in full of all claims.

Plaintiff produced evidence tending to show that the fall of the insured on the stairs on October 11th produced a big lump on his head - over the left eye; that he was in bed one day but did not have a doctor, and thereafter proceeded about his ^{usual} affairs and employment; that there was a marked change in his disposition; that he did not seem to be as pleasant as before the fall but was cross and unfriendly. It scarcely needs argument to support the conclusion that this fails to prove that the fall on October 11th caused his death on November 28th.

caused his death on November 1921.

Conclusion that this fall is given that the fall on October 1921
 gross and untimely. It scarcely needs argument to suggest the
 that he did not seem to be as pleasant as before the fall but was
 and employment; that there was a marked change in his disposition;
 did not have a doctor, and thereafter proceeded about his affairs
 on his head - over the left eye; that he was in bed one day but
 of the insured on the night of October 1921 ordered a big lamp
 Plaintiff produced evidence tending to show that the fall
 here) had agreed to accept this lamp and in full of all claims.
 part and death certificate attached," and that the widow (Plaintiff)
 that "Deceased died of organic heart disease, as per doctor's re-
 port that the employer having that the deceased was an accident, but
 in a lump sum. Under the terms of the settlement it was agreed
 compromised by the payment by the employer to Plaintiff of \$2000
 in an accident" and had died of heart disease. This claim was
 compensation in which it was stated that George J. King "was killed
 killed before the Industrial Commission of Illinois a claim for
 against the insured's employer, in which Plaintiff stated and
 There was also evidence produced by Plaintiff
 stated that death was due either to epilepsy or a heart condition.
 head, was very much congested, bluish, red, and that this indi-
 an accidental death"; that the body, particularly the face and
 organic trouble caused his death. I mean by that, that was not
 his death; this doctor testified that in his opinion "instantly"
 was summoned who came about ten minutes later and pronounced
 when suddenly the insured collapsed and fell down; a Mr. Hanson
 cell; they were resting just before placing it on the truck,
 upon a truck; eight men, including the insured, were standing the
 one coil about 30 or 35 feet long, out of a room to be placed
 Westfall & Campbell Company, receiving a refrigerating coil.

But counsel for plaintiff argue that Dr. Weiner, testifying as an expert, gave evidence tending to support plaintiff's claim. In answer to a hypothetical question Dr. Weiner testified that "the cause of death could or might be produced by the injury to his head on October 11th." In Doyle v. Prudential Ins. Co. of America, 280 Ill. App. 628, we had occasion to pass upon similar testimony of an expert witness who said that there "might or could be" a causal connection between an accident and the insured's death. We there said that the plaintiff had the burden of proving that the insured sustained bodily injuries solely through external, violent and accidental means resulting in the death of the insured, and that the evidence of the expert did not meet this requirement. We said that the opinion of the expert was merely surmise or conjecture, and that this cannot be regarded as proof, citing Stevens v. Illinois Central R. R. Co., 306 Ill. 370. A similar case was under consideration in National Life & Acc. Ins. Co. v. Kendall, 248 Ky. 768, where the court said that the circumstances might raise a "supposition" that an accident caused the fatal disease, "but a supposition is not enough; a judgment cannot be rested on a supposition." Applying what has been held in these and other cases, we are of the opinion that plaintiff failed to prove the essential allegations of her claim with reference to the cause of death.

At the conclusion of all the evidence defendant moved that the jury be instructed to find the issues for defendant, which motion was denied. As there was no evidence to submit to the jury the motion should have been allowed.

For the reasons above indicated, the judgment is reversed without remanding the cause.

REVERSED.

Matchett, P. J., and O'Connor, J., concur.

but counsel for plaintiff argues that Dr. Weiner, testifying as an expert, gave evidence tending to support plaintiff's claim. In answer to a hypothetical question Dr. Weiner testified that "the cause of death could or might be produced by the injury to his head on October 11th." In People v. Brundage, 130 Cal. 2d 111, 43 P.2d 825, we had occasion to pass upon similar testimony of an expert witness who said that there "might or could be" a causal connection between an accident and the insured's death. We there said that the plaintiff had the burden of proving that the insured sustained bodily injuries solely from an external, violent and accidental means resulting in the death of the insured, and that the evidence of the expert did not establish this requirement. We said that the opinion of the expert was merely evidence of causation, and that this cannot be regarded as proof, citing People v. Illinois Central R. Co., 36 Cal. 2d 111, 230 P.2d 111. A similar case was under consideration in People v. Life & Acc. Ins. Co. v. Central, 34 Cal. 2d 111, 228 P.2d 111, where the court said that the circumstances must raise a "suspicion" that an accident caused the fatal disease, "but a supposition is not enough; a suggestion cannot be taken as a conclusion." Applying what has been said in these and other cases, we are of the opinion that plaintiff failed to show the essential allegations of her claim with reference to the cause of death. At the conclusion of all the evidence defendant moved that the jury be instructed to find the insured not negligent, which motion was denied. As there was no evidence to sustain the jury the motion should have been allowed.

For the reasons above indicated, the judgment is reversed without remanding the cause.

REVEREND

Matchett, J., and O'Connor, J., concur.

38896

CITY OF CHICAGO,

Appellee,

vs.

SOL BERNSTEIN,

Appellant.

47
APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

287 I.A. 612¹

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Defendant, tried by the court, was found guilty of the violation of section 4283 of an ordinance of the City of Chicago, fined \$100, and he appeals.

The ordinance provides that it shall be unlawful for any person to post, stick or tack any notice, sign, etc., calculated to attract the attention of the public, upon any building without first obtaining the written consent of the owner, agent, lessee or occupant of such premises.

Defendant first says that this ordinance is void as unreasonable and beyond the power of the City to enact and enforce, citing Wice v. C. & N. W. Ry. Co., 193 Ill. 351; there it is said that the power of the city was limited to the enactment of such ordinances as promote the public good, and an ordinance which prohibited anyone alighting or boarding any car while it was in motion was held void; that the ordinance was unreasonable as it applied to places where it would be safe to alight when the train was moving slowly. It was held that this was not related to any question of public safety. In Consumers Co. v. City of Chicago, 313 Ill. 408, it was held that the police power extends to protection of the lives and health of all persons, "and the protection of all property within the State." Chicago v. Green Mill Gardens, 305 Ill. 87. The posting of signs on a building is in the nature of a trespass, and the legislature has passed laws intended to protect owners of property against trespass. Ill. State Bar Stats. 1935, chap. 38, par. 594. In Saxton v. City of Peoria, 75 Ill. App. 397,

38898

CITY OF CHICAGO,

Appellee,

vs.

SOL BERNSTEIN,

Appellant.

APPEAL FROM SUPREME COURT

OF ILLINOIS.

287 I.A. 612

MR. JUSTICE MCKENNA DELIVERED THE OPINION OF THE COURT.

Defendant, tried by the court, was found guilty of the

violation of section 4283 of an ordinance of the City of Chicago,

enacted 1900, and he appeals.

The ordinance provides that it shall be unlawful for any

person to post, stick or tack any notice, sign, etc., calculated

to attract the attention of the public, upon any building, without

first obtaining the written consent of the owner, agent, lessee or

occupant of such premises.

Defendant first says that this ordinance is void as un-

reasonable and beyond the power of the City to enact and enforce,

citing Wise v. O. & N. Ry. Co., 193 Ill. 321; there it is said

that the power of the city was limited to the enactment of such

ordinances as promote the public good, and an ordinance which re-

sisted anyone sleeping or boarding any car while it was in motion

was held void; that the ordinance was unreasonable as it applied

to places where it would be safe to alight when the train was

moving slowly. It was held that this was not related to any ques-

tion of public safety. In Conners Co. v. City of Chicago, 213

Ill. 402, it was held that the police power extends to protection

of the lives and health of all persons, "and the protection of all

property within the State." Chicago v. Green Mill Casino, 205

Ill. 87. The posting of signs on a building is in the nature of a

trespass, and the legislature has passed laws intended to protect

owners of property against trespass. Ill. State Bar Assn. 1934,

chap. 35, sec. 204. In Saxon v. City of Berlin, 78 Ill. App. 207,

the court sustained as valid an ordinance which forbade anyone from trespassing upon any private premises. The ordinance in the instant case has for its purpose the protection of the property owner and is a reasonable exercise of the police power on behalf of the citizens.

Complaint is made that the judgment is void as finding defendant guilty of the violation of another city ordinance rather than the one under consideration. The entry of the erroneous judgment was due to a clerical error of the clerk of the Municipal court who confused the section number of the ordinance. This error has been corrected and a supplemental record showing the correct judgment has been filed in this court.

Complaint is also made that the procedure was not according to the Municipal Court act in that the complaint was not sworn to by the police officer who made the arrest. The complaint was sworn to by a private individual who claimed to have seen the commission of the offense. The argument seems to be that under section 49 of the Municipal Court act, chap. 37, Ill. State Bar Stats. 1935, par. 438, a police officer may arrest only when he has seen the act violating an ordinance. This is true if the officer is the only one who sees the act of violation, but paragraphs 2 and 3 provide for a complaint by a private person. The evidence here shows that no police officer saw the alleged offense, but the private person who signed the complaint testified that he saw it and notified the officer of the offense, who made the arrest. It would be unreasonable to construe the statute as holding that a private individual who saw an offense, not seen by a police officer, cannot sign the complaint, which would mean that only those offenses observed by an officer could be prosecuted.

Defendant is on more substantial ground in his argument and that the evidence is insufficient to support the finding/ the

the court sustained as valid an ordinance which forbade anyone from trespassing upon any private premises. The ordinance in the instant case has for its purpose the protection of the property owner and is a reasonable exercise of the police power on behalf of the citizens.

Complaint is made that the judgment is void as binding defendant guilty of the violation of another city ordinance rather than the one under consideration. The error of the ordinance judgment was due to a clerical error on the clerk of the Municipal Court who confused the section number of the ordinance. This error has been corrected and a supplemental record showing the correct judgment has been filed in this court.

Complaint is also made that the procedure was not according to the Municipal Court act in that the complaint was not sworn to by the police officer who made the arrest. The complaint was sworn to by a private individual who claimed to have seen the commission of the offense. The argument seems to be that under section 49 of the Municipal Court act, chap. 37, 111. Stats. for 1935, par. 428, a police officer may arrest only when he has seen the person violating an ordinance. This is true in the officer is the only one who sees the act of violation, but paragraphs 2 and 3 provide for a complaint by a private person. The evidence here shows that no police officer saw the alleged offense, but the private person who issued the complaint testified that he saw it and notified the officer of the offense, who made the arrest. It would be unreasonable to require the state to admit that a private individual who saw an offense, not seen by a police officer, cannot sign the complaint, which would mean that only those offenses observed by an officer could be prosecuted. Defendant is on more substantial ground in the argument and that the evidence is insufficient to support the finding.

judgment. Two witnesses testified that they saw defendant pasting a sticker on the building. Defendant denied that he had done this. As we have said, the ordinance is directed against a trespass, and the acts mentioned are not unlawful when done with the consent of the owner, agent, lessee or occupant of the premises. The absence of consent is therefore an essential ingredient of the offense. In order to establish the guilt of defendant it was incumbent upon the prosecution to show that the poster was fixed to the building without the consent of the owner or his representative. There was an absence of any evidence to this effect.

Whether it is necessary to prove negative averments depends upon their nature and character, and as a general rule, where it is as easy for the plaintiff to prove the negative as it is for the defendant to disprove it, the burden of proof rests upon the plaintiff. Great Western R. R. Co. v. Bacon, 30 Ill. 347. In Sokol v. The People, 212 Ill. 238, it was said that where an act is made criminal, with exceptions embraced in the enacting clause creating the offense so as to be descriptive of it, the People must allege and prove that the defendant is not within the exceptions. In Abbau v. Grassie, 262 Ill. 636, it was said that courts must apply practical common sense in determining this question; that when the means of proving a fact are equally within the control of each party, then the burden is upon the party averring the negative; that the defendant has the burden only when he alone is in possession of proof that would disprove the negative averment and the other party is not in possession of such proof. In The People v. Talbot, 322 Ill. 416, it was held that where a statute defining an offense contains a proviso which is so incorporated with the language describing the offense that it cannot be described if the exception is omitted, such exception must be negatived in an indictment.

judgment. Two witnesses testified that they saw defendant putting a sticker on the building. Defendant denied that he had done this. As we have said, the explanation is directed against a trespass, and the acts mentioned are not unusual when done with the consent of the owner, agent, lessee or occupant of the premises. The absence of consent is therefore an essential ingredient of the offense. In order to establish the guilt of defendant it was incumbent upon the prosecution to show that the sticker was fixed to the building without the consent of the owner or his representative. There was no evidence of any avoidance to this effect.

Whether it is necessary to prove negative averments depends upon their nature and character, and as a general rule, where it is as easy for the plaintiff to prove the negative as it is for the defendant to disprove it, the burden of proof rests upon the plaintiff. Great Western F. B. Co. v. Mason, 20 Ill. 347. In Schulz v. The People, 212 Ill. 533, it was held that where an act is made criminal, with exceptions embraced in the enacting clause creating the offense so as to be descriptive of it, the people must allege and prove that the defendant is not within the exceptions. In Abraham v. Grzesiak, 282 Ill. 636, it was said that courts must apply practical common sense in determining the question; that when the means of proving a fact are equally within the control of each party, then the burden is upon the party averring the negative; that the defendant has the burden only when he claims in possession of proof that would disprove the negative averment and the other party is not in possession of such proof. In People v. Talbot, 292 Ill. 416, it was held that where a statute defining an offense contains a proviso which is an exception with the language describing the offense that it cannot be described if the exception is omitted, and exception must be negatived in an indictment.

As we have said, the provision of the ordinance in question conditioning the unlawfulness of the act upon the non-consent of the owner, makes this non-consent an essential element of the offense.

The City says that as defendant filed no written affidavit of defense he is confined to his oral testimony for his defense. The procedure in an action by a city to recover a penalty for the violation of an ordinance is quasi criminal, and it was not necessary for defendant to file a written affidavit of defense. City of Chicago v. Dickson, 221 Ill. App. 255.

The fact that defendant denied pasting any sticker on the building did not release the City from proving that the act which its witnesses testified to have seen was done without the consent of the owner.

For the reason that the evidence failed to prove an essential element of the offense charged, the judgment is reversed.

REVERSED.

Matchett, P. J., and O'Connor, J., concur.

38938

In the Matter of
THE ESTATE OF DANIEL GAWNE, Deceased.

Appeal of CLARA V. GAWNE, Executrix
under the Last Will and Testament
of Daniel Gawne, Deceased,
Appellant,

vs.

In Re Claim of WILLIAM L. O'CONNELL,
Successor Receiver of the Lincoln
State Bank of Chicago,
Appellee.

APPEAL FROM CIRCUIT
COURT OF COOK COUNTY.

287 I.A. 612

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of the Circuit court in an appeal from the order of the Probate court allowing the claim of the receiver of the Lincoln State Bank against the executrix of the last will and testament of Daniel Gawne, deceased.

We have detailed the facts and evidence heard in case No. 38939, opinion this day filed. In that case we have reversed the order of the Circuit court dismissing the complaint in equity, and have remanded the cause with directions to reform the note in controversy so as to show on its face that Daniel Gawne signed it "as Treasurer" and not in his individual capacity.

As we will assume that what should be done has been done, we will assume that the note has been reformed as indicated so that there is no liability against Daniel Gawne or his estate, and the judgment is reversed without remanding.

REVERSED.

Matchett, P. J., and O'Connor, J., concur.

In the Matter of
THE ESTATE OF DANIEL GUNNE, Deceased.

Applicant of CHARLES V. GUNNE, Executor
under the Last Will and Testament
of Daniel Gunne, Deceased,
Applicant.

vs.

In Re Claim of WILLIAM L. O'CONNOR,
Successor Receiver of the Illinois
State Bank of Chicago,
Applicant.

COURT OF CHANCERY
CITY OF CHICAGO

288 I.A. 61

THE JUSTICE HEREBY DELIVERS THE OPINION OF THE COURT.

This is an appeal from a judgment of the Circuit Court in an appeal from the order of the Probate Court allowing the claim of the receiver of the Illinois State Bank against the executor of the last will and testament of Daniel Gunne, deceased. We have detailed the facts and evidence herein in our 2883, opinion this day filed. In that case we have reversed the order of the Circuit Court allowing the beneficiary in equity, and have remanded the cause with directions to return the note in controversy so as to show on its face that Daniel Gunne owned it "as Treasurer" and not in his individual capacity. As we will assume that what should be done has been done, we will assume that the note has been returned as indicated so that there is no liability against Daniel Gunne or his estate, and the judgment is reversed without remand.

REVEREND,

Wm. L. O'Connor, J., Clerk.

38961

CORA MOEN,

Appellee,

vs.

RUTH'S BEAUTY SHOPPES, Inc.,
a Corporation,

Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

287 I.A. 612³

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff sought damages for alleged unskillful and negligent performance of defendant's services in giving plaintiff a permanent wave and upon trial by the court had a judgment for \$100, from which defendant appeals.

It is first said that the statement of claim is insufficient to support the finding and judgment in that it fails to allege that plaintiff was in the exercise of due care and caution for her own safety. Defendant filed an affidavit of merits in which it denied that the work was unskillfully and negligently performed, and alleged that it used the highest degree of care in giving plaintiff a permanent wave. No motion was made to strike the statement of claim except at the beginning of the trial, when counsel for defendant made a verbal motion to strike, which the court denied.

In an action of the fourth class in tort where the statement contains all the elements necessary to the cause of action so far as the defendant's duty and the breach of it are concerned, it is not necessary to aver a fact in no way connected with the tort. Lyons v. Kanter et al., 210 Ill. App. 78. And the same case in the Supreme court (285 Ill. 336) where the court said, "we will not, with the whole record before us, reverse the judgment for the purpose of letting the parties raise in a more formal way an issue of which they have already had the benefit of a full trial."

Plaintiff testified as to the application of the appliances

539321

COURT REPORT

Appellee,

vs.

WYATT'S BEAUTY SHOPPE, Inc.,
a Corporation,

Appellant.

LOCAL NO. 1171, I. O. O. F.
OF WICHITA.

287 I.A. 612

MR. JUSTICE MCKENNA DELIVERED THE OPINION OF THE COURT.

Plaintiff sought damages for alleged negligent and negligent performance of defendant's services in giving Plaintiff a permanent wave and upon trial by the court and a judgment for \$100, from which defendant appeals.

It is first said that the statement of claim is insufficient to support the finding and judgment in that it fails to allege that plaintiff was in the exercise of her care and caution for her own safety. Defendant filed an affidavit of merits in which it denied that the work was negligently and negligently performed, and alleged that it used the highest degree of care in giving plaintiff a permanent wave. No action was taken to strike the statement of claim except at the beginning of the trial, when counsel for defendant made a verbal motion to strike, which was denied.

In an action of the kind claim in court there is a presumption that all the elements necessary to the cause of action are contained in the complaint. If the complaint is defective, it is as the defendant's duty and the burden of it is on the defendant. Not necessary to aver a fact in no way connected with the tort. *Lyons v. Lyons et al.*, 250 Ill. App. 78. And the same case in the supreme court (250 Ill. 356) where the court said, "we will not with the whole record before us, reverse the judgment for the purpose of letting the parties raise in a more formal way an issue of which they have already had the benefit of a trial."

Plaintiff testified as to the application of the appliances

used in the giving of a permanent wave; they began to burn her head and she so told an attendant, who blew under the hair to cool it; it continued to burn but the attendant said this was because the hair was "very curly and it would be all right." She suffered pains during the night and blisters formed and the next morning she went to defendant's "Parlor" and complained of the burn and was given a jar of salve to put on the burned spots; they advised her to call on Dr. Summers if it did not get better; she called on Dr. Summers who treated her.

Defendant makes the argument that these injuries were not burns but were blisters caused by pulling the short hairs. However, defendant's witness, Dr. Summers, testified that plaintiff's injury was caused by a burn; that he found "evidence of a second or third degree burn." Evidence to the same effect was given by another doctor called by defendant, who testified that it was a third degree burn and that the wound did not look as if it were caused by pulling the hair. The evidence of defendant's three Doctors established that the injury was a burn.

The facts in this case are similar to those involved in Higgins v. Byrnes, 274 Ill. App. 440, where similar injuries were considered and a judgment sustained for the plaintiff, the opinion citing numerous authorities on the subject.

We see no reason to disagree with the finding of the trial Judge and the judgment is affirmed.

AFFIRMED.

Matchett, P. J., and O'Connor, J., concur.

used in the giving of a permanent wave; they began to burn her head and she so told an attendant, who blew under the hair to cool it; it continued to burn but the attendant said this was because the hair was "very curly and it would be all right." She suffered pains during the night and blisters formed and the next morning she went to defendant's "barber" and complained of the burn and was given a jar of ointment to put on the burned spots; they advised her to call on Dr. Summers if it did not get better; she called on Dr. Summers who treated her.

Defendant makes the argument that these injuries were not burns but were blisters caused by pulling the short hairs. However, defendant's witness, Dr. Summers, testified that plaintiff's injury was caused by a burn; that he found "evidence of a second or third degree burn." Evidence to the same effect was given by another doctor called by defendant, who testified that it was a third degree burn and that the wound did not look as if it were caused by pulling the hair. The evidence of defendant's three doctors established that the injury was a burn.

The facts in this case are similar to those involved in Higgins v. Lyons, 274 Ill. App. 440, where similar injuries were considered and a judgment sustained for the plaintiff, the opinion citing numerous authorities on the subject.

We see no reason to disagree with the finding of the trial judge and the judgment is affirmed.

McClure, J., and O'Connor, J., concur.

39055

HAROLD R. SCHRADZKI,
Appellant,

vs.

PATRICK WARREN and PATRICK
WARREN CONSTRUCTION COMPANY,
a Corporation,
Appellees.

7
APPEAL FROM ORDER OF CIRCUIT
COURT OF COOK COUNTY GRANTING
A NEW TRIAL.

287 I.A. 612⁴

MR. JUSTICE MCSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff, bringing suit on a quantum meruit basis to recover for services rendered by him as attorney for the defendants, upon trial had a verdict for \$15,000; the trial court sustained defendants' motion for a new trial, saying he could see no error in the record but was of the opinion the verdict of the jury was excessive; the new trial was granted solely upon that ground. Plaintiff petitioned this court for leave to appeal from this order, which was granted, thus presenting for determination the propriety of the order.

Defendant Patrick Warren approached plaintiff with a view to securing his services for defendants in certain matters requiring an attorney. There is some dispute as to the terms of employment. Plaintiff testified that he told Mr. Warren he would charge reasonable and fair fees. Warren testified the agreement was to pay plaintiff \$100 a day for every day he spent in court, and anything done outside of court would cost defendants nothing. There was other evidence tending to support plaintiff's version of the terms of employment and the jury was justified in accepting plaintiff's testimony on this point.

Plaintiff testified in detail as to his work as attorney in representing the defendants in some fifteen matters, nearly all of them involving a trial in court. The evidence shows they were conducted by plaintiff with professional skill and singular

HAROLD W. BOWMAN, JR.,
Appellant,

vs.

WATKINS, WALKER and PATTERSON,
WARREN CONSTRUCTION COMPANY,
a Corporation,
Appellees.

RECEIVED FROM DEPT. OF JUSTICE
RECORDS SECTION
JAN 10 1934

287 I.A. 612

THE JUDICIAL DEPARTMENT HAS DECIDED THE CASE.

Plaintiff, bringing suit on a quantum meruit basis to recover for services rendered by him as attorney for the defendants, upon trial had a verdict for \$1,000; the trial court announced defendants' motion for a new trial, saying he could see no error in the record but was of the opinion the verdict of the jury was excessive; the new trial was granted solely upon that ground. Plaintiff petitioned this court for leave to appeal from this order, which was granted, thus presenting for determination the propriety of the order.

Defendant Patrick Warren approached plaintiff with a view to securing his services for defendants in certain matters requiring an attorney. There is some dispute as to the terms of employment. Plaintiff testified that he told Mr. Warren he would charge reasonable and fair fees. Warren testified the agreement was to pay plaintiff \$100 a day for every day he spent in court, and anything done outside of court would be at defendant's expense. There was other evidence tending to support plaintiff's version of the terms of employment and the jury was justified in accepting plaintiff's testimony on this point.

Plaintiff testified in detail as to his work as attorney in representing the defendants in some fifteen matters, nearly all of them involving a trial in court. The evidence shows they were conducted by plaintiff with professional skill and diligence.

success.

Two attorneys practicing at this bar gave expert opinion testimony as to the reasonableness of the charges made by plaintiff for these services. Each of the witnesses valued the services at a substantially higher figure than that claimed by plaintiff and far in excess of the amount allowed by the jury. Defendants introduced no evidence to contradict that given by these attorneys.

Warren gave testimony tending to minimize the services rendered by plaintiff in what is called the "Nurses' Home" matter. This involved a contract by defendants to build for the County of Cook a home or dormitory in Chicago for \$1,410,000; Warren intimated that plaintiff was not an important factor in handling the contracts involved. Plaintiff testified in detail as to his services in this matter, and the attorneys testifying also went into details as to their value.

In the written motion for a new trial defendants presented only two points: (1) That the court erred in striking from the evidence the testimony of Patrick Warren to the effect that plaintiff was not employed by either or both of the defendants in connection with the Nurses' Home matter. (2) That the verdict was excessive. As to this second point, we are of the opinion that the amount of the verdict was well within the scope of the testimony and should be allowed to stand.

As we have indicated, Mr. Warren gave testimony intimating that plaintiff did not represent defendants as attorney in the Nurses' Home matter. The ruling of the court excluding this testimony was proper. In the sworn answer filed by defendants they admitted that plaintiff represented one or both of the defendants in all of these matters, including the Nurses' Home matter.

Section 40, Civil Practice act, chap. 110, par. 163, Ill. State Bar Stats. 1935, provides that every answer shall contain an

success.

Two attorneys practicing at this bar have offered evidence testimony as to the reasonableness of the charges made by plaintiff for these services. Each of the witnesses valued the services at a substantially higher figure than that claimed by plaintiff and far in excess of the amount allowed by the jury. Defendant introduced no evidence to contradict that given by these witnesses. Warren gave testimony tending to minimize the services rendered by plaintiff in what is called the "Nurses' Home" matter. This involved a contract by defendant to build for the County of Cook a home or dormitory in Chicago for \$1,410,000; Warren testified that plaintiff was not an important factor in handling the contract involved. Plaintiff testified in detail as to his services in this matter, and the attorneys testifying also went into details as to their value.

In the written motion for a new trial defendant presented only two points: (1) That the court erred in arriving from the evidence the testimony of Patrick Warren to the effect that plaintiff was not employed by either or both of the defendants in connection with the Nurses' Home matter. (2) That the verdict was excessive. As to this second point, we are of the opinion that the amount of the verdict was well within the scope of the testimony and should be allowed to stand.

As we have indicated, Mr. Warren gave testimony indicating that plaintiff did not represent defendant as attorney in the Nurses' Home matter. The ruling of the court excluding this testimony was proper. In the sworn answer filed by defendant they admitted that plaintiff represented one or both of the defendants in all of these matters, including the Nurses' Home matter. Section 40, Civil Practice Act, Chap. 110, Sec. 111, Illinois Statute, provides that every answer shall contain an

"explicit admission or denial of each allegation of the pleading," and it is also provided that "every allegation *** not explicitly denied shall be deemed to be admitted." When, therefore, in defendants' sworn answer it was admitted that the plaintiff represented them in all the matters claimed, they could not be heard either directly or by innuendo to say that plaintiff had not represented them in any of these matters. It is elementary that a party will not be permitted to disprove that which he has admitted in his pleadings. Wabash Ry. Co. v. Billings, 212 Ill. 37.

In this court, for the first time, defendants make the point that the evidence shows that the liability of the two defendants, if any, is several, and that the joint verdict is not supported by the evidence. The written motion for a new trial claimed only two points of error, which we have already stated. Nothing is contained in that motion which raises the question defendants now present, nor was the point raised or suggested upon the trial. It is a well settled rule that no points may be urged on review which are not embodied in the written motion for a new trial or raised upon the trial. All existing grounds not so specified in the written motion for a new trial are waived. Reilig v. Continental Casualty Co., 280 Ill. App. 142; McNulty v. Hotel Sherman Co., 280 Ill. App. 325; Spring Valley Coal Co. v. Chiaventone, 214 Ill. 314; Miller et al. v. McManis, 57 Ill. 126; Illinois Central R. R. Co. v. Johnson, 191 Ill. 594;

The objection goes only to the form of the verdict, and defendants, if they wished to object to this, should have made their objection when the form was submitted to the jury.

Moreover, there was evidence that Patrick Warren was the president, general manager and general agent of the defendant corporation and the principal beneficiary of the stock. The interests of both defendants are identical. The only payments ever received

"explicit admission or denial of each allegation of the pleading," and it is also provided that "very material facts not admitted and denied shall be deemed to be admitted." Again, however, in Johnson v. Johnson, 191 Ill. 344, the court held that the plaintiff's complaint was not defective in that it failed to allege that the defendant was guilty of the crime charged. The court said: "It is elementary that a party will not be permitted to disprove that which he has admitted in his pleadings. Johnson v. Johnson, 191 Ill. 344." In this case, for the first time, defendant made the point that the evidence shows that the liability of the two defendants, if any, is several, and that the joint verdict is not supported by the evidence. The written motion for a new trial claimed only two points of error, which we have already passed. Nothing is contained in that motion which raises the question defendant now present, nor was the point raised or suggested upon the trial. It is a well settled rule that no points may be urged on review which are not embodied in the written motion for a new trial or raised upon the trial. All existing grounds not so specified in the written motion for a new trial are waived. Illinois v. Johnson, 191 Ill. 344; Garrett v. Co., 230 Ill. App. 143; Woolley v. Co., 230 Ill. App. 328; Boring Valley Coal Co. v. Union, 214 Ill. 314; Miller et al. v. McDonald, 27 Ill. 126; Illinois Central R. Co. v. Johnson, 191 Ill. 344.

The objection goes only to the form of the verdict, and defendant, if they wished to object to this, should have made such objection when the form was submitted to the jury.

Moreover, there was evidence that the defendant was president, general manager and general agent of the defendant corporation and the principal beneficiary of the stock. The interests of both defendant and plaintiff are identical. The only questions ever raised

by plaintiff for services rendered were in the form of checks of the Construction company, which were in payment of services defendants now claim were for the sole benefit of Patrick Warren individually. We think the evidence justifies the conclusion that Patrick Warren was doing business under a "corporate veil."

The evidence fully justified the verdict, and there were no reversible errors upon the trial.

For the reasons above indicated the order granting a new trial is reversed and the cause is remanded to the trial court with directions to deny defendants' motion for a new trial and to enter judgment for the plaintiff on the verdict rendered.

REVERSED AND REMANDED.

Matchett, P. J., and O'Connor, J., concur.

by plaintiff for services rendered were in the form of checks of
the Corporation to pay, which were in payment of services re-
fendants now claim were for the sale of the said property rather
individually. We think the evidence justifies the conclusion that
Patrick Warren was doing business under a "corporate veil."
The evidence fully justified the verdict, and there were
no reversible errors upon the trial.
For the reasons above indicated the order granting a new
trial is reversed and the cause is remanded to the trial court
with directions to deny defendants' motion for a new trial and to
enter judgment for the plaintiff on the verdict rendered.
REVEREND AND HONORABLE,

Matchett, F. J., and O'Connor, J., concur.

39023

KATHERINE B. COMSTOCK et al.,
(Complainants) Appellees,

vs.

MORGAN PARK TRUST & SAVINGS BANK,
(a banking corporation), ADELINE
BENJAMIN, ALLEN T. PRICE, ENOCH
J. PRICE, ESTHER PRABEL PRICE,
HELEN N. PRICE, HUGH G. PRICE,
LILLIS PRICE ARMSTRONG, LOUISE A.
PRICE et al.,
(Defendants)

ADELINE BENJAMIN, ALLEN T. PRICE,
ENOCH J. PRICE, ESTHER PRABEL
PRICE, HELEN N. PRICE, HUGH G.
PRICE, LILLIS PRICE ARMSTRONG
and LOUISE A. PRICE,
Appellants.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

287 I.A. 613¹

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

A person who had a small deposit in the Morgan Park Trust & Savings Bank, brought a representative suit in equity to enforce liability against the stockholders of the bank in favor of the creditors of the bank, which was closed and in possession of the Auditor of Public Accounts. Afterward a few other persons who also had small deposits in the bank joined as complainants. The case was referred to a Master in Chancery, who took the evidence, made up his report, fixed the liability of stockholders, and a decree was entered in accordance with the recommendations of the master. A few of the stockholders, against whom the decree was entered, appealed to the Supreme court contending that constitutional questions were involved. The Supreme court, upon consideration, held that the constitutional questions raised had been many times decided adversely to defendants' contention and were no longer open for consideration, and ^{the} ~~that~~ case was transferred to this court.- Comstock v. Morgan Park Trust & Savings Bank, 363 Ill. 341. The court in its opinion said that one of the contentions made by defendants "challenges the validity of the amendment of 1929 to section 11 of

KATHARINE B. O'CONNOR et al.,
(Complainants) Appellants

vs.

MORGAN PARK TRUST & SAVINGS BANK,
(a banking corporation), AS PLAINTIFF,
BENJAMIN ALLEN T. PRICE, THOMAS
J. PRICE, ESTHER PRARAH
PRICE, WILLIAM K. PRICE, HUGH G. PRICE,
LILLIS PRICE ARNOLD, LOUISE A.
PRICE et al.,
(Defendants)

ADELINE BENJAMIN ALLEN T. PRICE,
THOMAS J. PRICE, ESTHER PRARAH
PRICE, WILLIAM K. PRICE, HUGH G.
PRICE, LILLIS PRICE ARNOLD
and LOUISE A. PRICE,
Appellants.

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

A person who had a small deposit in the Morgan Park Trust & Savings Bank, brought a representative suit in equity to enforce liability against the stockholders of the bank in favor of the creditors of the bank, which was closed and in possession of the Auditor of Public Accounts. Afterward a few other persons who had small deposits in the bank joined as complainants. The case was referred to a master in chancery, who took the evidence, made up his report, fixed the liability of stockholders, and a decree was entered in accordance with the recommendations of the master. A few of the stockholders, against whom the decree was entered, appealed to the Supreme Court contending that constitutional questions were involved. The Supreme Court, upon consideration, held that the constitutional questions raised had been fully and adversely to defendants' contention and were no longer open for consideration, and the case was transferred to this court. The case is Stock v. Morgan Park Trust & Savings Bank, 388 Ill. 341. The court in its opinion said that one of the contentions made by defendants "challenges the validity of the enactment of 1929 to section 11 of

APPELLATE COURT OF ILLINOIS

OF 1902 C. 111.

287 I.A. 613

the general Banking act, which empowers the court to authorize the payment of complainants' solicitor's fees and other costs of litigation out of moneys collected from stockholders. Appellants are in no position to raise this question. The decree appealed from made no allowance for solicitor's fees. They were allowed in former orders, to which no objections were made and from which no appeal was perfected. Even if there were grounds for resistance to the allowance of such fees, the creditors, and not the stockholders, are the only ones who could object, as the stockholders have no interest whatever in the distribution of the funds which they are compelled to pay. The stockholders are not concerned about how much or how little may be allowed as solicitor's fees or whether any are allowed at all. Their liability is neither increased nor diminished by such an allowance, if made."

The record discloses that a meeting of the Board of Directors of the Morgan Park Trust & Savings Bank was held at four o'clock Sunday afternoon, January 24, 1932, at the home of the president of the bank in Chicago, at which time a resolution was adopted which recited that "on account of the continual withdrawals by depositors on their resources, the secondary reserves of the bank have been exhausted to the extent that the bank feels it is unable to meet such continual withdrawals." And it was resolved that "in order to conserve the assets for the benefit of the creditors of the bank, the Auditor of Public Accounts be and he is hereby requested to take charge for the purpose of examination and such other action as he deems proper, and that a copy of this resolution be immediately transmitted to him."

The following day, Monday, January 25, the Auditor of Public Accounts took charge of the bank as requested, and it was not opened thereafter. An hour or so after the Auditor took possession the complaint in the instant case was filed by M. Lipshitz, who al-

the General Banking act, which empowers the court to authorize the payment of complainants' solicitor's fees and other costs of litigation out of moneys collected from stockholders. Appellants are in no position to raise this question. The decree appealed from made no allowance for solicitor's fees. They were allowed in former orders, to which no objections were made and from which no appeal was perfected. Even if there were grounds for resistance to the allowance of such fees, the creditors, and not the stockholders, are the only ones who could object, as the stockholders have no interest whatever in the distribution of the funds which they are compelled to pay. The stockholders are not concerned about how much or how little may be allowed as solicitor's fees or whether any are allowed at all. Their liability is neither increased nor diminished by such an allowance, if made."

The record discloses that a meeting of the Board of Directors of the Northern Park Trust & Savings Bank was held at four o'clock Sunday afternoon, January 24, 1932, at the home of the president of the bank in Chicago, at which time a resolution was adopted which recited that "on account of the continued withdrawal by depositors on their resources, the secondary reserves of the bank have been exhausted to the extent that the bank finds it is unable to meet such continued withdrawals." And it was resolved that "in order to conserve the assets for the benefit of the creditors of the bank, the Auditor of Public Accounts be and he is hereby requested to take prompt action for the purpose of examination and such other action as he deems proper, and that a copy of this resolution be immediately transmitted to him."

The following day, Monday, January 25, the Auditor of Public Accounts took notice of the bank as required, and it was not opened thereafter. An hour or so after the Auditor took possession the complaint in the instant case was filed by W. H. Lippitt, who al-

stockholders

leged that he had on deposit in the bank \$167. And the prayer was that the ~~directors~~ be held liable under the provisions of section 6 of article 11 of the constitution of this State; that a receiver be appointed to receive and disburse the moneys collected from the stockholders and that an injunction issue enjoining all other persons, who claim to be creditors, from instituting any suit against the ~~directors~~ to recover their stock liability.

It was alleged in the bill that before the commencement of business January 25, 1932, the Auditor of Public Accounts made an examination of the bank to determine its financial condition, and had closed the bank and taken control of its property to prohibit the further carrying on of its business; that the bank was indebted in excess of one and one-half million dollars and its assets were carried on its books in excess of one million dollars; that it had ceased to do business and was wholly insolvent and that the bill was brought on behalf of complainant and all other creditors.

February 25, 1932, the Auditor of Public Accounts found that the bank could not be reorganized and should be liquidated through a receivership, and in compliance with the statute he appointed a receiver. March 4, 1932, the Auditor filed his bill in the Circuit court of Cook county for the liquidation of the bank and his appointment of the receiver was confirmed. Afterward an amended and supplemental bill was filed in the instant suit. There were numerous and protracted hearings before the master, and while the evidence was being taken the defendants who prosecute this appeal, on October 18, 1934, filed their cross-bill in which they set up that the receiver appointed by the Auditor had paid a "dividend" of 25% to the general creditors of the bank, and they sought to have the amount of this dividend credited, and prayed that the complainants be enjoined from continuing the prosecution of the suit until the result of the final liquidation of the assets of the bank might be ascertained

leged that he had on deposit in the bank \$107. And the receiver was that the receiver be held liable under the provisions of section 6 of article 11 of the constitution of this State; that a receiver be appointed to receive and disburse the money collected from the stockholders and that an injunction issue enjoining all other persons, who claim to be creditors, from instituting any suit against the receiver to recover their stock liability.

It was alleged in the bill that before the commencement of business January 28, 1932, the Auditor of Public Accounts and an examination of the bank to determine its financial condition, and had closed the bank and taken control of its property to prohibit the further carrying on of its business; that the bank was indebted in excess of one and one-half million dollars and its assets were estimated on its books in excess of one million dollars; that it had ceased to do business and was wholly insolvent and that the bill was brought on behalf of creditors and all other creditors.

February 25, 1932, the Auditor of Public Accounts found that the bank could not be reorganized and should be liquidated through a receivership, and in compliance with the statute he appointed a receiver. March 4, 1932, the Auditor filed his bill in the Circuit Court of Cook County for the liquidation of the bank and his appointment of the receiver was confirmed. Afterward he received and reported to the court his bill in the instant suit. There were numerous and protracted hearings before the court, and while the evidence was being taken the defendants who prosecute this appeal, on October 18, 1934, filed their cross-bill in which they set up that the receiver appointed by the Auditor had paid a "dividend" of 25% to the general creditors of the bank, and they sought to have the amount of this dividend credited, and argued that the commission to be enjoined from continuing the prosecution of this bill until the result of the final liquidation of the assets of the bank was ascertained.

and determined. The cross-bill was, on motion of complainant, stricken for want of equity.

The record discloses that the bank was insolvent, as shown by the resolution of the board of directors, at the time it was taken over by the Auditor of Public Accounts January 25, 1932; and it further appears the assets of the bank were in the possession of the receiver, and if we assume the stock liability sought to be enforced be collected in full, the total assets will be wholly insufficient to pay the creditors.

Defendants contend that since the original bill was filed at 10 a. m. of the day the bank was closed by the Auditor, the suit was premature and cannot support the decree of March 4, 1935, which is the decree appealed from. And the argument is that at the time of the filing of the bill, the bank "had not gone or been put into liquidation, and the Circuit court had no jurisdiction to entertain the original bill." That the Auditor at the time he took possession, and prior to the filing of the bill, had not made an examination of the bank to determine whether it was insolvent or not. We think the contention cannot be sustained. The directors admitted insolvency. The liability of a stockholder in a bank is a primary one imposed by the constitution and the statute. His liability is contractual. Heine v. Degen, 362 Ill. 357. In that case a bill was filed in behalf of complainants and certain other creditors to enforce the stockholders' liability under section 6 of article 11 of the Constitution and under the statute on Banking. And it was held that the right to maintain such a representative suit could not again be questioned in view of the former decisions of the Supreme court, citing Golden v. Cervenka, 278 Ill. 409, and other cases. The court there also held that it was not error to deny defendants' motion to proceed without first requiring the claims of creditors to be proved, and said (p. 373) that, "It

and determined. The cross-bill was, on motion of counsel,

striken for want of verity.

The record discloses that the bank was insolvent, as shown

by the resolution of the board of directors, at the time it was

taken over by the Auditor of Public Accounts January 22, 1935;

and it further appears the assets of the bank were in the possession

of the receiver, and it was assumed the stock liability would be

enforced as collected in full, the total assets will be wholly in-

sufficient to pay the creditors.

Defendants contend that since the original bill was filed

at 10 a. m. of the day the bank was closed by the Auditor, the

bill was premature and cannot support the decree of March 4, 1935,

which in the decree appeared that the bank was not open on that day

time of the filing of the bill, the bank was not open on that day

into liquidation, and the Circuit Court had no jurisdiction to en-

tertain the original bill. That the Auditor at the time he took

possession, and after the filing of the bill, had not made an

examination of the bank to determine whether it was insolvent or

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bank is a primary one imposed by the constitution and the statute,

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that case a bill was filed in behalf of creditors and certain

other creditors to enforce the stockholders' liability under sec-

tion 6 of article 11 of the constitution and under the statute on

banking, and it was held that the right of creditors was a res-

servative suit could not again be instituted in view of the former

decisions of the Supreme Court, citing Delaware v. Garvin, 234 Ill.

409, and other cases. The court there also held it was not

error to deny defendants' motion to proceed against their paying

the claims of creditors to be proved, and said (4. 375) that, "it

is not a prerequisite that all claims be proved by the creditors in order to determine the amounts owing by the individual stockholders who are primarily liable." Continuing the court said (p. 379): "We reviewed the authorities in that decision, and from what it contains there can be no question that the cause of action here is contractual. The liability is a primary one imposed by the constitution and the statute, and is read into the contract of purchase, by operation of law, whenever a share of stock is bought."

A bank is insolvent when it is unable to meet its liabilities as they become due in the ordinary course of business; it is insolvent when it cannot pay its depositors on demand. Babka Plastering Co. v. City State Bank of Chicago, 264 Ill. App. 142.

In the Babka Plastering Co. case an amended and supplemental bill was filed on behalf of the complainants and all other creditors to enforce the constitution superadded liability of stockholders. It was contended that the evidence failed to show that the bank was insolvent. The court there said (p. 160): "it was not necessary to prove that the bank was insolvent as the liability of the stockholder to the creditor is primary, and is regarded as that of partners, occupying the same relation to the creditor as the bank itself, owing the same debt to the depositor as the bank owes, and he can be sued for the debt just as the bank may be sued, and as soon as the bank may be sued."

Defendants further contend that complainants did not come into equity with clean hands; that "in a case of this kind where the Court must rely on the good faith and disinterestedness of the complainants and their solicitors for the proper representation not only by their own claims, but those of all other creditors whom they are allowed by statute to represent"; that the complainant alleged he had a deposit in the bank of \$167; that the bill was signed and sworn to not by complainant but by one of his solicitors;

is not a prerequisite that all claims be proved by the creditors in order to enter into the winding up of the insolvent estate. Holders who are contractually liable. "Confining the court said (p. 370): "We reviewed the authorities in great detail, and from what it contains there can be no question that the scope of action here is contractual. The liability is a primary one imposed by the constitution and the statute, and is read into the contract of purchase, by operation of law, whenever a note of stock is issued. A bank is insolvent when it is unable to meet its liabilities as they become due in the ordinary course of business; it is insolvent when it cannot pay its liabilities on demand. Banking Co. v. City State Bank of Chicago, 284 Ill. App. 147. In the Bank of America case an amended and supplemental bill was filed on behalf of the complainants and all other creditors to enforce the constitution superadded liability of stockholders. It was contended that the evidence failed to show that the bank was insolvent. The court there said (p. 100): "It was not necessary to prove that the bank was insolvent as the liability of the stockholder to the creditor is primary, and is read into the contract of partners, covering the same relation to the creditor as the bank itself, owing the same debt to the creditor as the bank owes, and he can be held for the debt that the bank may be sued, and as soon as the bank may be sued."

Defendants further contend that complainants did not come into equity with clean hands; that "in a case of this kind where the Court must rely on the good faith and distinctness of the complainants and their solicitors for the proper presentation and only by their own claims, but those of all other creditors whom they are allowed by statute to represent"; that the bill was amended and a deposit in the bank of \$107; that the bill was aimed and sought to not by complainants but by one of the solicitors;

that it was prepared on a mimeograph form by filling out blank spaces; that it was incomplete, or greatly exaggerated all the facts, as later appeared from the evidence; that it was filed a few hours after the Auditor began his examination; that on the hearing it appeared that complainant had a balance of only \$5.69 on deposit; that he did not, before the bill was filed, consult with his solicitor who purported to represent him; that afterward complainant was given leave to file an amended and supplemental bill in which another complainant joined him, who had filed a similar bill in the Superior court of Cook county; that some other persons who became co-complainants were young children who had savings accounts in the bank subject to their fathers' control.

The record discloses that on the day the bank was closed and on which date Lipshitz filed his bill in the instant case, two other similar cases were filed in the courts of Cook county, and we think it apparent, in view of all the facts, that it may be safely said the suits were not filed primarily for the benefit of the creditors but rather to obtain solicitors' fees. (See Cohen v. Central Republic Trust Co., 282 Ill. App. 569.) But in view of what we have above said, to the effect that a creditor had a right to file such a suit as soon as the bank closed, and that the statute (sec. 11) provides that solicitors' fees may be allowed, we think the objections urged are not vital to the maintenance of the suit. Section 11, chap. 16a, Illinois State Bar Stats. 1935, which authorizes the filing of the suit, provides that the liability of stockholders of a bank "may be enforced by any creditor of such association by bill in equity, in the nature of a creditor's bill brought by such creditor on behalf of himself and all other creditors of the association against the shareholders thereof, in any court having jurisdiction in equity for the county in which such bank or banking association may have been located or established."

that it was prepared on a subpoena issued by the Illinois State Bank and Trust Co. and that it was incomplete, or possibly incomplete at the time it was prepared from the evidence; that it was filed a few hours after the latter began his deposition; that on the basis it appeared that complainant had a balance of only \$1.00 on deposit at the time he did not, before the bill was filed, comply with his notice to appear and to represent him; that after the complaint was given leave to file an amended and supplemented bill in which another complainant joined him, who had filed a similar bill in the Superior Court of Cook County; that some other persons who became complainants were young children who had savings accounts in the bank subject to their father's control.

The record discloses that on the day the bank was closed and on which late complainant filed his bill in the instant case, two other similar cases were filed in the courts of Cook County, and we think it apparent, in view of all the facts, that it may be safely said the suits were not filed primarily for the benefit of the creditors but rather to get in non-creditors' hands. (See Exhibit A.) General Republic Trust Co., 229 Ill. App. 2d 100, and in view of what we have above said, to the effect that a creditor has a right to file such a suit as soon as the bank closes, and that the statute (sec. 11) provides that creditors' claims may be allowed, we think the objections urged are not valid to the maintenance of the suit. Section 11, Chap. 120, Illinois State Bank Act, 1905, which authorizes the filing of the bill, provides that the Illinois stockholders of a bank may be interested by any creditor of such association by bill in equity, in the matter of a creditor's bill brought by such creditor on behalf of himself and all other creditors of the association against the bank and its officers, in any court having jurisdiction in equity for the purpose of obtaining an order or banking association may have been located or established.

Defendants further contend that the original, amended and supplemental bill alleged that the bank was insolvent and that its liabilities were greatly in excess of its assets when the receiver was appointed by the auditor; that this was the gist of the case and that the proof failed to sustain these allegations. And the further point is made that the court erred in dismissing the defendants' cross bill because this is the proper procedure where defendants seek to bring into the case matters which arose after the case was at issue. Counsel for complainants say that the evidence shows the bank was insolvent and that this is shown because nearly 3½ years after the bank was in liquidation it still owed its creditors nearly five hundred thousand dollars. Defendants reply that, applying the 25% paid by the receiver who was appointed by the Auditor, the unpaid liabilities are \$426,589, and not \$500,000, and that "liquidation has continued since that time must be conceded - to what extent this record does not disclose." Since the bank was admittedly insolvent at the time the original bill was filed, and has continued to be insolvent, we think the allegations of the original amended and supplemental bill have been sustained. And since the liability of the defendant was primary, as the authorities all hold, the allegation of the cross bill that a 25% dividend had been paid by the receiver appointed by the Auditor, was wholly immaterial. The amount of the liability of each stockholder is fixed wholly independent of any dividends that may be paid.

Complaint is made that it was error for the court to admit in evidence calculations made by an Auditor from the records of the bank which show the liabilities, etc., of the bank. The books were voluminous and were sufficiently identified. The auditor was

Defendants further contend that the original, amended and supplemental bill alleged that the bank was insolvent and that its liabilities were greatly in excess of its assets when the receiver was appointed by the Auditor; that this was the gist of the case and that the proof failed to establish these allegations. And the further point is made that the court erred in dismissing the defendants' cross bill because this is the proper procedure when defendants seek to bring into the case matters which arose after the case was at issue. Counsel for complainants say that the evidence shows the bank was insolvent and that this is shown because nearly 3 1/2 years after the bank was in liquidation it still owed its creditors nearly five hundred thousand dollars. Defendants reply that, applying the 2d paid by the receiver, the unpaid liabilities are \$42,535, and pointed by the Auditor, the unpaid liabilities are \$42,535, and not \$500,000, and that "liquidation has continued since that time must be conceded - to what extent this record does not show. Since the bank was admittedly insolvent at the time the original bill was filed, and has continued to be insolvent, so that the allegations of the original amended and supplemental bill have been sustained. And since the liability of the defendant was primarily, as the authorities will hold, the obligation of the cross bill that a 2d dividend had been paid by the receiver appointed by the Auditor, was wholly immaterial. The amount of the liability of each stockholder is fixed wholly independent of any dividends that may be paid.

Complaint is made that it was error for the court to admit in evidence calculations made by an Auditor from the records of the bank which show the liabilities, etc., of the bank. The books were voluminous and were entirely illegible. The auditor was

qualified and in these circumstances there was no error in admitting the audit in evidence. People v. Gerold, 265 Ill. 448; Golden v. Cervenka, 278 Ill. 409.

In the Gerold case the court said (p. 460): "Where the originals consist of numerous documents, books, papers or records which cannot conveniently be examined in court and the fact to be proved is the general result of an examination of the whole collection, evidence may be given as to such result by any competent person who has examined the documents, provided the result is capable of being ascertained by calculation." Citing a number of authorities.

Defendants further contend that the fees allowed to the Master were not warranted. The Master filed three itemized statements showing the work done and the several amounts he requested. The first and second were objected to and then the third was filed. There are three items: (1) The Master certified he had taken and had reported 344 pages of testimony containing 860 folios at 15 cents a folio, for which he charged \$129; the second item was for \$1174.65 for examining exhibits which included the certificates of organization of the bank, orders of court appointing a receiver, stock certificate books, totalling 7831 folios at fifteen cents a folio. The third item claimed was for \$1550 for obtaining files, docketing and hearing cause, reporting, and hearing objections. The Master certified the cause had been very sharply contested from the outset, entailed an unusual amount of labor, and that he set the case for hearing and continued it ten times; that there were hearings on fourteen different days, in which 33½ hours were required, that he received a number of letters, made many telephone calls, etc. The court allowed half this amount of \$1550, or \$775. The record contained 1687 pages. The first item allowed^{was} in accordance with the statute, section 20, chap. 53, Ill. State Bar

qualified and in these circumstances there was no error in admitting

the audit in evidence. People v. Marshall, 208 Ill. 400; People v.

Germany, 208 Ill. 400.

In the Germany case the court said (p. 400): "With respect to

originals consist of letters, documents, books, papers or records

which cannot conveniently be examined in court and the fact to be

proved is the general result of an examination of the whole collection,

evidence may be given as to each receipt by any competent

person who has examined the documents, provided the result is

capable of being ascertained by calculation." Quinn v. Union of

authorities.

Defendants further contend that the fees allowed to the

Master were not warranted. The Master filed three itemized statements

showing the work done and the several amounts he requested.

The first and second were objected to and then the third was filed.

There are three items: (1) The Master certified he had taken and

had reported 344 pages of testimony containing 500 folios at 15

cents a folio, for which he charged \$192; the second item was for

\$114.68 for examining exhibits which included the certificates

of examination of the bank, orders of court appointing a receiver,

such certificate books, totaling 7851 folios at fifteen cents a

folio. The third item claimed was for \$150 for obtaining fifteen

doctored and hearing cases, reporting, and hearing objections.

The Master certified the cases had been very largely contested from

the outset, entitled an unusual amount of labor, and that he had

the case for hearing and continued it ten days; that there were

hearings on fifteen different days, in which 85 hours were re-

quired, that he received a number of letters, made many telephone

calls, etc. The court allowed half the amount of \$150, or \$75.

The record contained 1387 pages. The fees were allowed in ac-

cordance with the statute, section 60, Chap. 53, Ill. Stat. 1897

Stats. 1935. We think the amount allowed the Master appears to be entirely warranted by the itemized schedule attached to his report, taken in connection with all the facts in the case. Gottschalk v. Noyes, 225 Ill. 94; Rosenfeld v. Horwich, 221 Ill. App. 304.

The decree of the Circuit court of Cook county is affirmed.

DECREE AFFIRMED.

Matchett, P. J., and McSurely, J., concur.

States. 1932. We think the record allowed the court appears to be
entirely warranted by the interest actually attached to his report.
taken in connection with the facts in the case. Williams v. Williams
1932, 290 Ill. 94; Williams v. Williams, 290 Ill. 94, 95.
The decree of the circuit court of Cook county is affirmed.
DOROTHY WILLIAMS.

Witness my hand and seal of office, at Chicago, Ill., January 1, 1933.

38705

BEN SIEGEL and SIMON GOLD, doing
business as S. & G AUTO FINANCE
CO., and MAX PODOLSKY,

Appellees,

v.

MOTOR VEHICLE CASUALTY COMPANY,
a corporation,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

287 I.A. 613²

MR. PRESIDING JUSTICE DENIS E. SULLIVAN DELIVERED THE
OPINION OF THE COURT.

This is an appeal from a judgment of \$800 entered in
the Municipal Court in favor of plaintiffs and against the defendant
insurance company based upon a policy of insurance on the automobile
of Max Podolsky, which was stolen. The cause was tried before a
judge and a jury of six men.

Plaintiffs' statement of claim alleges that a policy of
insurance was issued by defendant to Max Podolsky on December 12,
1932, covering a Buick automobile, and insuring him against actual
loss due to theft, robbery or pilferage; that said policy contained
a mortgage clause which also insured the plaintiffs, Ben Siegel
and Simon Gold, doing business as S. & G. Auto Finance according
to the tenor and effect of said mortgage clause and the policy of
insurance; that on December 10, 1932, Ben Siegel and Simon Gold,
doing business as S & G Auto Finance Co. became the holders and
owners of a chattel mortgage on said automobile and the note secured
thereby for the sum of \$924, payable in installments of \$77 per
month; that on April 26, 1933, said automobile was stolen; that there
is now due and unpaid upon the note and chattel mortgage the sum of
\$462, together with interest at 7% per annum from July 10, 1933;
that the value of the automobile on the date of its loss was \$1200;
that defendant has failed to indemnify plaintiffs for their loss.

38705

Ben Simon and Simon Gold, doing
business as S. & G. Auto Finance
Co., and Max Podolsky,

Appellants,

v.

MOTOR VEHICLE CASUALTY COMPANY,
a corporation,

Appellant.

ADMINISTRATIVE

DE CHICAGO.

3871A.613

MR. PRESIDING JUSTICE DAIS E. SULLIVAN DELIVERED THE

OPINION OF THE COURT.

This is an appeal from a judgment of \$800 entered in

the Municipal Court in favor of plaintiff and against the defendant
insurance company based upon a policy of insurance on the automobile
of Max Podolsky, which was stolen. The cause was tried before a
judge and a jury of six men.

Plaintiff's statement of claim alleges that a policy of
insurance was issued by defendant to Max Podolsky on December 10,
1932, covering a Buick automobile, and insuring him against actual
loss due to theft, robbery or pilferage; that said policy contained
a mortgage clause which also insured the plaintiff, Ben Simon
and Simon Gold, doing business as S. & G. Auto Finance Company,
to the tenor and effect of said mortgage clause and the policy of
insurance; that on December 10, 1932, Ben Simon and Simon Gold,
doing business as S. & G. Auto Finance Co. became the holders and
owners of a chattel mortgage on said automobile and the note secured
thereby for the sum of \$324, payable in installments of \$27 per
month; that on April 28, 1933, said automobile was stolen; that the
is now due and unpaid upon the note and chattel mortgage the sum of
\$423, together with interest at 7% per annum from July 10, 1933;
that the value of the automobile on the date of its loss was \$1200;
that defendant has failed to indemnify plaintiff for their loss.

In its affidavit of merits the defendant states that the policy of insurance sued upon was issued in consideration of certain warranties made by Max Podolsky; that these warranties were known by the said plaintiff to be false and untrue at the time they were made; that said plaintiff had not purchased a new automobile, but had purchased a used and secondhand automobile; that the representations of the plaintiff in his warranty that he had purchased the car new and at a cost of \$1500 was untrue as he had paid only \$1300 for it; that the policy provided that if any of the warranties were untrue that said policy should become null and void; that the alleged theft described in the policy of insurance did not occur as alleged in plaintiff's statement of claim or in any other manner and that said automobile was not, in fact, stolen; that said policy provided that within sixty days after any loss the plaintiff should deliver to defendant at its home office in the City of Chicago a written statement, signed and sworn to by him, stating his knowledge and belief as to the date and cause of the loss; that the value of the automobile at the time of the alleged theft was not \$1200, but only \$600 and that the premium of \$69.12 paid by plaintiff on the policy was tendered back.

Max Podolsky, one of the plaintiffs, testified that on December 10, 1932, he purchased a 1932 Buick sedan from the West Side Auto Exchange which was represented to him as a demonstrator; that he paid \$1,385.00 for it; that at that time he traded in a new Ford for which he was allowed \$500 and that he paid \$100 in cash; that the balance was financed; that he took out insurance on the car the same day through a Mr. Russell; that Mr. Russell placed the insurance for him and the policy and the bill for same were from Charles U. Victor & Company; that he paid the \$85 premium on said policy to Mr. Russell; that his car was stolen on April 26, 1933, in Oak Park, Illinois while he was attending a high school

In its affidavit of service the defendant stated that the policy of insurance used upon was issued in consideration of certain warranties made by Max Podolsky; that these warranties were known by the said plaintiff to be false and untrue at the time they were made; that said plaintiff had not purchased a new automobile, but had purchased a used and second-hand automobile; that the representations of the plaintiff in his warranty that he had purchased the car new and at a cost of \$1300 was untrue as he had paid only \$1300 for it; that the policy provided that in any of the warranties were untrue that said policy should become null and void; that the alleged theft described in the policy of insurance did not occur as alleged in plaintiff's statement of claim or in any other manner and that said automobile was not, in fact, stolen; that said policy provided that within sixty days after any loss the plaintiff should deliver to defendant at its home office in the City of Chicago a written statement, signed and sworn to by him, stating his knowledge and belief as to the date and cause of the loss; that the value of the automobile at the time of the alleged theft was not \$1300, but only \$500 and that the premium of \$3.12 paid by plaintiff on the policy was returned back.

Max Podolsky, one of the plaintiffs, testified that on December 10, 1932, he purchased a 1932 Buick sedan from the West Side Auto Exchange which was represented to him as a demonstrator; that he paid \$1,325.00 for it; that at that time he traded in a new Ford for which he was allowed \$500 and that he paid \$100 in cash; that the balance was financed; that he took out insurance on the car the same day through a Mr. Russell; that Mr. Russell placed the insurance for him and the policy and the bill for same were from Charles U. Victor & Company; that he paid the \$35 premium on said policy to Mr. Russell; that his car was stolen on April 25, 1933, in Oak Park, Illinois while he was attending a high school

exhibition and that he reported the theft and notified the insurance company.

The evidence shows that the application for the insurance was made over the telephone by Charles U. Victor & Company, brokers, and the policy was made out in the office of the defendant; that when the application was received the counter clerk for the defendant inserted in it that the car was a model 32-37, and that the list price was \$1310; that the counter clerk got that information from The National Used Car Market Report book which insurance companies use and from that he determined the model; that the rest of the handwriting was that of Mrs. Victor, who was cashier in the office of Charles U. Victor & Company; that this clerk estimated from the book mentioned that the car was a new car and made out the policy and the premium for the same from the information which he received from this book regarding secondhand cars; that Podolsky had not stated that the automobile was a new one.

The evidence further shows that several months prior to the time Podolsky's automobile was stolen, an oral claim was made under this policy by him for two cushions that were stolen from his car which cushions were valued at \$40 and that the defendant paid the same upon the loss being reported to it; that no affidavit for the loss was required.

Inasmuch as the application for the insurance was not signed by the plaintiffs and was made out at the office of defendant company or its broker under the warranties named in the policy and was relied upon by the defendant, any statements which were erroneously written into the policy by defendant's clerk could not be binding upon the plaintiffs. As stated by our Supreme Court in Hancock v. Knights of Security, 303 Ill. 66, at page 71:

exhibition and that he reported the theft and notified the insurance company.

The evidence shows that the application for the insurance was made over the telephone by Charles U. Victor & Company, brokers, and the policy was made out in the office of the defendant; that when the application was received the counter clerk for the defendant inserted in it that the car was a model 32-37, and that the list price was \$1210; that the counter clerk got that information from The National Used Car Market Report book which insurance companies use and from that he determined the model; that the rest of the handwriting was that of Mrs. Victor, who was owner in the office of Charles U. Victor & Company; that this clerk testified from the book mentioned that the car was a new car and made out the policy and the premium for the same from the information which he received from this book regarding secondhand cars; that Podolsky had not stated that the automobile was a new one.

The evidence further shows that several months prior to the time Podolsky's automobile was stolen, an oral claim was made under this policy by him for two cushions that were stolen from his car which cushions were valued at \$40 and that the defendant the same upon the loss being reported to it; that no affidavit for the loss was required.

Inasmuch as the application for the insurance was not signed by the plaintiff and was made out at the office of defendant company or its broker under the name of the company named in the policy and was relied upon by the defendant, any statements which were erroneously written into the policy by defendant's clerk could not be binding upon the plaintiff. As stated by our Supreme Court in Harwood v. Knights of Security, 203 Ill. 50, at page 71:

"Any statement made by an applicant for insurance which relates to risk, and is declared by the policy, or in another instrument incorporated with it, to be a condition of the insurance, is a warranty."

As we have already stated, no application was signed by the plaintiffs.

It is next contended that the court erred in not granting defendant's motion for a directed verdict. Where there is contradictory evidence, it is the duty of the court to submit the cause to the jury. Grange Mill Co. v. Western Assurance Co., 118 Ill. 396. Under the circumstances the trial court would have been compelled to weigh the evidence had it granted such a motion. Darmody v. Kroger Grocery Co., 362 Ill. 554. In denying this motion the trial court was not in error.

When the defendant paid the prior claim made by Podolsky, when the cushions of the automobile were stolen, it recognized the policy as valid, and as was said in 32 Corpus Juris on page 1315;

"Where a ground exists upon which the company may have the right to avoid or forfeit the policy, it may with knowledge thereof intentionally relinquish its right, or its conduct may justify insured in the belief that it does not intend to take advantage of it; hence, it may be estopped from claiming that the policy is avoided or forfeited if insured acts in reliance upon this belief to his prejudice. The courts being loathe to enforce a forfeiture are prompt to seize upon any circumstances which indicate a waiver on the part of the company, or which will raise an estoppel against it."

It appears that the method of doing business on the part of the defendant was to deliver the policy in question to Charles U. Viotor & Company who in turn delivered it to Russell who delivered it to Podolsky. It appears from the evidence that when Podolsky's automobile was stolen he telephoned the defendant's office and notified it of the theft; that he later went to the office of the defendant company and saw a Mr. Hill there and Podolsky signed a statement. The policy provides among other things that proof of loss must be delivered at the home office in Chicago and a written statement signed and sworn to within sixty days. This was not done but no objection

"Any statement made by an applicant for insurance which relates to risk, and is declared by the policy, or in another instrument incorporated with it, to be a condition of the insurance, is a warranty."

As we have already stated, no application was signed by the plaintiff. It is next contended that the court erred in not granting defendant's motion for a directed verdict. Where there is contrary testimony, it is the duty of the court to submit the case to the jury. Granger Mill Co. v. Western Insurance Co., 118 Ill. 33. Under the circumstances the trial court would have been compelled to weigh the evidence and it granted such a motion. Deady v. Kreser Grocery Co., 328 Ill. 554. In denying this motion the trial court was not in error.

When the defendant paid the prior claim made by Podolsky, when the conditions of the automobile were stolen, it recognized the policy as valid, and as was said in 33 Corpus Juris on page 1110:

"Where a ground exists upon which the company may have the right to void or forfeit the policy, it may, with knowledge thereof, intentionally relinquish its right, or its conduct may justify inaction in the belief that it does not intend to take advantage of it; where, it may be estopped from claiming that the policy is voided or forfeited if inaction was in reliance upon this belief to his prejudice. The courts being loathe to enforce a forfeiture are prompt to seize upon any circumstances which indicate waiver on the part of the company, or which will raise an estoppel against it."

If appears that the method of doing business on the part of the defendant was to deliver the policy in question to Charles Victor & Company who in turn delivered it to Russell who delivered it to Podolsky. It appears from the evidence that when Podolsky's automobile was stolen he telephoned the defendant's office and notified it of the theft; that he later went to the office of the defendant company and saw a Mr. Will there and Podolsky signed a statement. The policy provides among other things that proof of loss must be delivered at the home office in Chicago and a written statement signed and sworn to within sixty days. This was not done but no objection

was made to the statement and the same was received by the company after the sixty days had expired, which we believe constituted a waiver of this requirement.

Objection is made to certain rulings of the court on the admissibility of evidence, but from an inspection of them we do not find that any reversible error was committed.

Objection is made to certain instructions by the court but after carefully considering them, we do not find that any one of them is prejudicial to the defendant. It appears from the record that no objection was made at the time the instructions were given. Rule 171 of the Municipal Court, provides as follows:

"Objections to the charge must be made before the jury retire and must specifically point out wherein the part objected to is erroneous and the party objecting must indicate clearly the correction therein desired to be made and upon the objections being made the judge may make such corrections as he may deem proper."

The purpose of this rule doubtless is that the jury may be properly instructed as to the law and the court is entitled to the assistance of counsel in making him point out wherein the instructions are erroneous so that the jury may be properly instructed as to the law before they leave the bar of the court. Defendant not having made his objection at the time of the trial, it cannot now be made the basis for an appeal nor an assignment of error as an afterthought.

As to the proof of the loss or theft of plaintiff Podolsky's automobile, we think the evidence tends to show that the automobile was stolen and the defendant has failed to maintain its defense that the automobile was not stolen. The burden of proof to establish a misrepresentation or concealment and the falsity and materiality thereof, as well as any fraudulent intent and reliance thereon, rests upon the insurer. Gurley v. Massac County Mutual Relief Assn.

was made to the statement and the same was received by the company after the sixty days had expired, which is a waiver of this requirement.

Objection is made to certain rulings of the court on the admissibility of evidence, but from an inspection of them we do not find that any reversible error was committed.

Objection is made to certain instructions by the court but after carefully considering them, we do not find that any one of them is prejudicial to the defendant. It appears from the record that no objection was made at the time the instructions were given. Rule 171 of the Mississippi Court, provides as follows:

"Objections to the charge must be made before the jury retire and must specifically point out wherein the part objected to is erroneous and the party objecting must indicate clearly the correction therein desired to be made and upon the objections being made the judge may make such corrections as he may deem proper."

The purpose of this rule doubtless is that the jury may be properly instructed as to the law and the court is entitled to the assistance of counsel in making him point out wherein the instruction is erroneous so that the jury may be properly instructed as to the law before they leave the bar of the court. Defendant not having made his objection at the time of the trial, it cannot now be made the basis for an appeal nor an assignment of error on an afterthought. As to the proof of the loss or theft of plaintiff's automobile, we think the evidence tends to show that the automobile was stolen and the defendant has failed to rebut in its defense the evidence that the automobile was not stolen. The burden of proof to establish a misrepresentation or concealment and the falsity and materiality thereof, as well as any fraudulent intent and reliance thereon, rests upon the insurer. Wiley v. Home State Mutual Insurance Co.

186 Ill. App. 492; Harrison v. United States Fidelity & Guaranty Co.
255 Ill. App. 263.

As to the amount of the judgment, there was some evidence which tended to show that the value of the automobile at the time of the trial was \$1200 and the evidence of the defendant was that it was worth from \$600 to \$800. In weighing the evidence a jury is particularly well-fitted to determine where the preponderance lies. We cannot say that the verdict was not supported by a preponderance or greater weight of the evidence.

For the reasons herein given the judgment of the Municipal Court is affirmed.

JUDGMENT AFFIRMED.

HEBEL AND MALL, JJ. CONCUR.

188 Ill. App. 482; Barry v. United States Fidelity & Guaranty Co.
228 Ill. App. 262.

As to the amount of the judgment, there was some evidence which tended to show that the value of the automobile at the time of the trial was \$1800 and the evidence of the defendant was that it was worth from \$600 to \$800. In weighing the evidence a jury is particularly well-fitted to determine where the preponderance lies. We cannot say that the verdict was not supported by a preponderance or greater weight of the evidence.

For the reasons herein given the judgment of the Appellate Court is affirmed.

JUDGMENT AFFIRMED.

HERBERT AND HALL, JJ. CONCUR.

38789

ROBERT D. MELICK,

Appellee,

v.

THE METROPOLITAN CASUALTY INSURANCE
COMPANY OF NEW YORK, a corporation,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

287 I.A. 613³

MR. PRESIDING JUSTICE DENIS E. SULLIVAN DELIVERED THE
OPINION OF THE COURT.

This is an appeal from a judgment entered in the
Municipal Court in favor of the plaintiff, Robert D. Melick, and
against the defendant, The Metropolitan Casualty Company of New York,
for the sum of \$1,079.20 and costs for failure of defendant to
plead over after the court had overruled defendant's written motion
to strike plaintiff's statement of claim, and from which defendant
appeals.

On November 13, 1935, plaintiff filed his statement of
claim, which reads as follows:

"1. That he is the holder of a certain Guaranty
issued by the defendant, guarantying the payment of Bond
No. 198 for the sum of \$1,000, issued by 'MIDWEST ATHLETIC
CLUB', issued November 1st, 1935 and payable November 1st,
1935, and the semi-annual interest thereon of \$32.50 pay-
able on the respective due dates of May 1st, and November
1st, and default has been made by the issuer thereof of
May 1st, 1935, of coupon No. 19 in said sum of \$32.50 and
November 1st, 1935 of coupon No. 20, together with said
principal sum of \$1,000.00 on said November 1st, 1935,
all of which items draw interest after maturity at 7% per
annum; that defendant has been notified of said defaults
and demand has been made upon the defendant to pay said
respective sums, under its contract so to do as follows:

THE METROPOLITAN
CASUALTY INSURANCE CO.
OF NEW YORK

'2513

Chartered 1874
Home Office - 55 Fifth avenue

FOR VALUE RECEIVED, HEREBY GUARANTEES TO THE HOLDER OF
THE PRINCIPAL AMOUNT OF THE BOND HEREINAFTER DESCRIBED
AND THE PAYMENT OF THE INTEREST COUPONS THERETO ATTACHED,
AS THE SAME FALL DUE, UPON THE CONDITION THAT, AT ITS

38783

ROBERT D. MILLIK,

Appellee,

v.

THE METROPOLITAN CASUALTY INSURANCE
COMPANY OF NEW YORK, a corporation,

Appellant.

287 I.A. 613

OF 1912-1913

MUNICIPAL COURT

APPEAL FROM

MR. PRESIDENT JUSTICE DAVID M. WHELAN DELIVERED THE

OPINION OF THE COURT.

This is an appeal from a judgment entered in the

Municipal Court in favor of the plaintiff, Robert D. Millik, and

against the defendant, The Metropolitan Casualty Insurance Company of New York

for the sum of \$1,079.80 and costs for failure of defendant to

pled over after the court had overruled defendant's written motion

to strike plaintiff's statement of claim, and from which defendant

appeals.

On November 13, 1935, plaintiff filed his statement of

claim, which reads as follows:

"1. That he is the holder of a certificate of deposit
issued by the defendant, guaranteeing the payment of \$100,000
No. 108 for the sum of \$1,000, issued by 'MILIK INVESTMENT
TRUST', issued November 1st, 1935 and payable November 1st,
1936, and the semi-annual interest thereon of \$24.50 pay-
able on the respective due dates of May 1st, and November
1st, and that he has been made by the issuer thereof of
May 1st, 1935, of coupon No. 19 in said sum of \$24.50 and
November 1st, 1935, of coupon No. 20, together with said
principal sum of \$1,000.00 on said November 1st, 1936,
all of which items drew interest after maturity at 4 per
annum; that defendant has been notified of said default
and demand has been made upon the defendant to pay said
respective sum, under the contract so to do as follows:

'3512

THE METROPOLITAN
CASUALTY INSURANCE CO.
OF NEW YORK

Registered 1974

Home Office - 33 Fifth Avenue

FOR VALUE RECEIVED, HENRY GUARANTY TO THE ORDER OF
THE PRINCIPAL AMOUNT OF THE BOND HEREIN CONTAINED
AND THE PAYMENT OF THE PAYMENT HEREON TO BE MADE
AS THE SAME FALL DUE, UNDER THE CONDITION THAT, AT 1%

OPTION, IT IS TO BE ALLOWED SIXTY (60) DAYS FROM DATE OF THE MATURITY WITHIN WHICH TO PAY THE PRINCIPAL AMOUNT, BUT WITH INTEREST IN THE MEANTIME AT THE COUPON RATE,

Description of Bond

Number 198 - - - Amount - - - \$1,000.00 - - Date of Maturity November 1, 1935, BEING ONE OF THE SERIES OF BONDS AGGREGATING \$1,200,000.00 SECURED BY A DEED OF TRUST MADE BY * * * MIDWEST ATHLETIC CLUB CORPORATION in Favor of CHICAGO TITLE AND TRUST COMPANY, as Trustee, DATED THE 1st, DAY OF NOVEMBER, 1925, covering property known Midwest Athletic Club * * * SIGNED AND DATED THIS 18th day of JANUARY, 1926.

The Metropolitan Casualty Insurance Company, of New York,

By L.E. Maccall

(Corporate Seal)

Vice President

Attest H. M. Clume

Assistant Secretary

That there is now due to plaintiff the said principal	\$1,000.00
Coupon 19, of May 1st, 1935	32.50
Coupon 20, of Nov. 1st, 1935	32.50
Accrued interest at 7% to date	3.86
Making a total so due plaintiff	<u>\$1,068.86</u>

for which plaintiff sues; defendant having refused to pay as contracted so to do.

Robert D. Melick

Attorney, pro se.

Robert D. Melick makes oath and says as follows - he is attorney and plaintiff and has knowledge of the facts related in the foregoing Statement of Claim and the same are true as stated; that there is due from the defendant to the plaintiff, after allowing to the defendant all its just credits, deductions and set-offs, the sum of \$1,068.86 with interest thereon at 7% per annum from November 13, 1935.

Robert D. Melick

Subscribed and Sworn to by said Robert D. Melick, before me this 13th day of November A. D. 1935.

Maurice Weissman

Notary Public. (SEAL) "

After entering its appearance the defendant made a written motion to strike plaintiff's statement of claim and to dismiss the cause for the following reasons:

"1. The plaintiff in his statement of claim fails to allege that he is the legal owner of Bond No. 198 of Midwest Athletic Club in the face amount of \$1,000, dated November 1, 1925, due November 1, 1935 and fails to allege that he is the owner of a certain guaranty referred to in his said Statement of Claim, guaranteeing payment of said bond.

OPTION, IT IS TO BE ALLOWED SIXTY (60) DAYS FROM DATE OF THE MATURITY WITHIN WHICH TO PAY THE PRINCIPAL AMOUNT, BUT WITH INTEREST IN THE MEANTIME AT THE GOVERNMENT RATE.

Description of Bonds

Number 198 -- -- -- Amount -- \$1,000.00 -- Date of Maturity November 1, 1932, BEING ONE OF THE SERIES OF BONDS AGGREGATING \$1,800,000.00 ISSUED BY A TRUST COMPANY BY * * * MIDWEST ATHLETIC CLUB CORPORATION IN FAVOR OF CHICAGO TIME AND TRUST COMPANY, as Trustee, DATED THE 1st DAY OF NOVEMBER, 1932, covering property known Midwest Athletic Club -- * SIGNED AND DATED THIS 15th day of JANUARY, 1933.

The Metropolitan Casualty Insurance Company, of New York.

BY L. E. McCall Vice President (Corporate Seal)

Attest H. M. Cline Assistant Secretary

That there is now due to plaintiff the said principal \$1,000.00 Coupon 19, of May 1st, 1932 33.50 Coupon 20, of Nov. 1st, 1932 33.50 7.50 accrued interest at 7% to date 1,000.00 Making a total so due plaintiff 2,374.50 for which plaintiff sues; defendant having refused to pay as contracted so to do.

Robert D. Melick Attorney, pro se.

Robert D. Melick makes oath and says as follows -- He is attorney and plaintiff and has knowledge of the facts related in the foregoing statement of claim and the same are true as stated; that there is due from the defendant to the plaintiff, after allowing to the defendant all its just credits, deductions and set-offs, the sum of \$1,000.00 with interest thereon at 7% per annum from November 1, 1932.

Robert D. Melick Subscribed and sworn to by said Robert D. Melick, before me this 15th day of November A. D. 1933. Notary Public (State)

After entering its appearance the defendant came a motion to strike plaintiff's statement of claim and to dismiss the cause for the following reasons:

"1. The plaintiff in its statement of claim fails to allege that he is the legal owner of bond no. 198 of Midwest Athletic Club in the face amount of \$1,000, dated November 1, 1932, due November 1, 1933 and fails to allege that he is the owner of a certain property referred to in his said statement of claim, representing payment of said bond.

2. Even though the plaintiff is the owner of said bond and guaranty, which the defendant does not admit, plaintiff's Statement of Claim herein fails to state a cause of action in that the guaranty upon which said Statement of Claim is based, which is set forth therein in words and figures, provides that the defendant at its option, (which it hereby elects to exercise without in any way admitting any liability under the terms of said guaranty or waiving any defenses it may have thereto) shall be allowed sixty (60) days from the date of the maturity of the bond within which to pay the principal amount of such bond. The plaintiff's Statement of Claim alleges that said bond became due November 1, 1935, and therefore no cause of action will arise on said guaranty until December 31, 1935."

This was duly verified by defendant's agent who stated that the above and foregoing motion was not filed for the purpose of delay.

On December 12, 1935, plaintiff consented to the defendant filing its motion to strike his statement of claim and a counter motion whereby plaintiff gave notice that he would move that judgment be entered against defendant on disposing of its motion to strike, on the following grounds appearing on the face of the record:

- "(a) Your guarantee is to pay the holder of Bond 198 of ~~the~~ ~~off~~ ~~the~~ Midwest Athletic Club of \$1,000 and coupons-2 for \$32.50 each.
- (b) Your guarantee does not defer the bringing of suit for 60 days.
- (c) Default on its contract after demand authorizes suit.
- (d) Demand having been made for payment by the owner of bond and guarantee, and no notice of deference having ~~then~~ been given as to principal, its 60 day privilege was waived.
- (e) On plaintiff's demand for payment of bond and coupons on November 2nd, 1935, and defendant then not giving notice that it would elect to take 60 days to pay the principal and paying the coupons at such time, may not after suit is brought, on the expiration of 29 days, say as a matter of defense it would elect the provision waived - being in default of coupon payments.

Robert D. Melick
Attorney, Pro se."

3. Even though the plaintiff is the owner of said bond and guaranty, which the defendant does not admit, plaintiff's statement of claim herein is to state a cause of action in that the guaranty upon which said statement of claim is based, which is set forth therein in words and figures, provides that the defendant at the option, (which it hereby elects to exercise without in any way admitting any liability under the terms of said guaranty or allowing any defense it may have thereto) shall be allowed sixty (60) days from the date of the maturity of the bond within which to pay the principal amount of such bond. The plaintiff's statement of claim alleges that said bond became due November 1, 1935, and therefore no cause of action will arise on said guaranty until December 31, 1935."

This was duly verified by defendant's agent who stated that the above and foregoing motion was not filed for the purpose of delay. On December 18, 1935, plaintiff consented to the defendant filing its motion to strike his statement of claim and a counter-motion whereby plaintiff gave notice that he would move that judgment be entered against defendant on disposing of its motion to strike, on the following grounds appearing on the face of the

record:

- (a) "Your guarantee is to pay the holder of bond 138 of the Midwest Athletic Club of \$1,000 and coupons-2 for \$25.00 each.
- (b) Your guarantee does not defer the bringing of suit for 60 days.
- (c) Default on the contract after demand authorizes suit.
- (d) Demand having been made for payment by the owner of bond and guarantee, and no notice of defense having been given as to principal, its 60 day privilege was waived.
- (e) On plaintiff's demand for payment of bond and coupons on November 2nd, 1935, and defendant then not giving notice that it would elect to take 60 days to pay the principal and coupons the coupons at such time, may now enter suit as provided, on the expiration of 60 days, say as a matter of defense it would elect the provision raised - being in default of coupon payments.

Robert J. Miller
Attorney, etc.

On the same day, December 12, 1935, on motion of the defendant the court ordered that the time to file a statement of defense be extended 10 days.

On December 26, 1935, an order was entered by the court stating that the defendant was in default for want of an affidavit of merits of defense in this cause, and on motion of the plaintiff it was ordered by the court that default be entered herein against said defendant.

Thereafter a notice was served upon Melick, by the attorneys for The Metropolitan Casualty Insurance Co. of New York, stating that they would appear before the court and present defendant's motion to vacate the default entered December 26, 1935, which was supported by an affidavit. The affidavit reads as follows:

"Oreighton S. Miller, being first duly sworn, on oath deposes and says that he is one of the attorneys for and agent of The Metropolitan Casualty Insurance Co. of New York, a corporation, defendant in the above and foregoing cause, and duly authorized to make this affidavit for and in its behalf; that due to inadvertence the attorneys for said The Metropolitan Casualty Insurance Co. of New York did not notice in the daily Municipal Court record of Tuesday, December 24, 1935, that the above entitled cause was set for December 26, 1935, and therefore said attorneys did not appear in Court; that said defendant believes it has a good and meritorious defense to all or part of the statement of claim filed in said cause and desires to argue before the Court its motion to strike on file in the above entitled cause; that in the opinion of said defendant the plaintiff will not be prejudiced by the vacating of said order of default."

The motion to vacate, based on the affidavit, was denied by the trial court and the court thereupon found, as provided by law, that the amount of plaintiff's demand from the defendant after allowing all just credits, deductions and set-offs, is as follows:

"and that this cause is a suit for the recovery of money, and that the defendant herein is in default for having failed to comply with the order of this court entered herein requiring said defendant to file a statement of defense in this cause, it is ordered by the court that default be entered herein against the defendant The

On the same day, December 18, 1935, on motion of the defendant the court ordered that the time to file a statement of defense be extended 10 days.

On December 26, 1935, an order was entered by the court stating that the defendant was in default for want of an affidavit of merits of defense in this cause, and on motion of the plaintiff it was ordered by the court that default be entered herein against said defendant.

Thereafter a notice was served upon Melick, by the attorneys for The Metropolitan Casualty Insurance Co. of New York, stating that they would appear before the court and present defendant's motion to vacate the default entered December 28, 1935, which was supported by an affidavit. The affidavit reads as follows:

"Greighton B. Miller, being first duly sworn, on oath deposes and says that he is one of the attorneys for and agent of The Metropolitan Casualty Insurance Co. of New York, a corporation, defendant in the above and foregoing cause, and duly authorized to make this affidavit for and in its behalf; that due to inadvertence the attorneys for said The Metropolitan Casualty Insurance Co. of New York did not notice in the daily Municipal Court record of Tuesday, December 24, 1935, that the above entitled cause was set for December 26, 1935, and therefore said attorneys did not appear in court; that said defendant believes it has a good and meritorious defense to all or part of the statement of claim filed in said cause and desires to argue before the court its motion to strike on file in the above entitled cause; that in the opinion of said defendant the plaintiff will not be prejudiced by the vacating of said order of default."

The motion to vacate, based on the affidavit, was denied.

by the trial court and the court thereupon found, as provided by law, that the amount of plaintiff's demand from the defendant after allowing all just credits, deductions and set-offs, is as follows:

"and that this cause is a suit for the recovery of money, and that the defendant herein is in default for having failed to comply with the order of this court entered herein requiring said defendant to file a statement of defense in this cause, it is ordered by the court that default be entered herein against the defendant The

Metropolitan Casualty Insurance Co. of New York, a corporation, for want of such statement of defense.

And as to the damages sustained by the plaintiff herein, the Court heard the evidence contained in the affidavit of plaintiffs claim filed herein, and finds therefrom that there is due to the plaintiff the sum of money shown in said affidavit of claim to be due and assesses the plaintiffs damages at the sum of Ten Hundred Seventy Nine and 20/100 Dollars (\$1079.20)."

The court further found that the plaintiff have and recover of and from the defendant the sum of \$1079.20 together with costs and that execution issue therefor.

It appears from the record before us that the defendant through its neglect failed to file an affidavit of defense as provided by law and now seeks to make a distinction between the "holder" of a bond and the "legal holder". The terms "holder", "owner", and "bearer" in commercial parlance are well understood and, presumptively at least, give to such possessor of the security the right to exercise ownership over it, and we do not think there is, in the meaning of the words, any distinction between "owner" and "legal owner" in so far as the legal rights of the parties in the case are concerned.

It is contended by the defendant that the term of the guarantee by which it is to be allowed sixty days from the date of the maturity, within which to pay the principal amount, makes the commencement of a suit before the expiration of that time premature. In its affidavit of defense which was stricken, in speaking of the option, it states that it hereby elects to exercise the same without in any way admitting any liability or waiving any defense it may have thereto. The terms of the guarantee state that they should have sixty days in which to pay the money and the defendant does not ask that it be given the privilege of paying it within sixty days, but, on the contrary, it states that it elects to exercise the option without in any way admitting any liability under the terms of said guarantee. In other words, that even though they were given sixty

Metropolitan Casualty Insurance Co. of New York, a corporation, for want of such statement of damages. And as to the damages sustained by the plaintiff herein, the Court held the evidence contained in the affidavit of plaintiff's claim filed herein, and finds therefrom that there is due to the plaintiff the sum of money shown in said affidavit of claim to be due and assesses the plaintiff's damages at the sum of Ten Hundred Seventy Nine and 00/100 Dollars (\$1079.00).

The court further found that the plaintiff have and recover of and from the defendant the sum of \$1079.00 together with costs and that execution issue thereon.

It appears from the record before us that the defendant through its neglect failed to file an affidavit of defense as provided by law and now seeks to make a distinction between the "holder" of a bond and the "legal holder". The terms "holder", "owner", and "bearer" in commercial parlance are well understood and, respectively, give to such possessor of the security the right to exercise ownership over it, and we do not think there is, in the meaning of the words, any distinction between "owner" and "legal owner" in so far as the legal rights of the parties in the case are concerned.

It is contended by the defendant that the term of two guarantee by which it is to be allowed sixty days from the date of the maturity, within which to pay the principal amount, makes the commencement of a suit before the expiration of that time premature. In its affidavit of defense which was attached, in speaking of the option, it states that it hereby elects to exercise the same without in any way admitting any liability or waiving any defense it may have thereto. The terms of the guarantee state that they should pay sixty days in which to pay the money and the defendant does not say that it is given the privilege of paying it within sixty days, but, on the contrary, it states that it elects to exercise the option without in any way admitting any liability under the terms of said guarantee. In other words, that even though they were given sixty

days additional time they did not intend to pay it at that time. If the makers of this guarantee had intended that they were to be given **sixty** days after the same became due, before commencing suit, it would have been a very easy matter for them to use the proper language giving them that added time. But, inasmuch as the defendant after demand is made does not choose to exercise the option or election as provided in the contract, he cannot now complain of his own action.

The judgment having been entered because of the default of the defendant in not filing an affidavit of defense when the case was reached for trial, and setting up no facts in its affidavit which would constitute a reason for vacating the said default, we are of the opinion that the Municipal Court properly denied the motion to vacate the default and properly entered the judgment for the plaintiff.

For the reasons herein given the judgment of the Municipal Court is affirmed.

JUDGMENT AFFIRMED.

HEBEL AND HALL, JJ. CONCUR.

days additional time they did not intend to pay it at that time. If the matter of this warrant was returned that they were to be given sixty days after the same became due, before becoming suit, it would have been a very easy matter for them to make the proper payment giving them that extra time. But, although the defendant after demand is made does not choose to exercise the option or election as provided in the contract, he cannot now complain of his own action.

The judgment having been entered because of the default

of the defendant in not filing an affidavit of defense when the same was reached for trial, and setting up no facts in its affidavit which would constitute a reason for vacating the said default, we are of the opinion that the Municipal Court properly denied the motion to vacate the default and properly entered the judgment for the plaintiff.

For the reasons herein given the judgment of the Municipal

Court is affirmed.

JUDGMENT AFFIRMED.

HEBEL AND HILL, JJ. CONCUR.

38816

THE PEOPLE OF THE STATE OF ILLINOIS,

Appellant,

v.

FRANK BUDASI,

Appellee.

ERROR TO

MUNICIPAL COURT

OF CHICAGO.

287 I.A. 613⁴

MR. PRESIDING JUSTICE DENIS E. SULLIVAN DELIVERED THE
OPINION OF THE COURT.

This case has been consolidated with case No. 38815,
entitled, The People of the State of Illinois v. Frank Budasi, in
which case we have today filed an opinion and the law applicable
in that case is controlling here.

For the reasons stated in our opinion in case No. 38815,
the judgment of the Municipal Court finding the defendant not guilty
and discharging said defendant is hereby reversed and the cause is
remanded for a new trial with directions to that court to strike the
petition of the defendant and vacate and set aside the order setting
aside the previous order of conviction and enter an order remanding
the defendant to the custody of the Superintendent of the House of
Correction to complete his sentence and enter such other orders as
may be necessary which are not inconsistent with the views herein
expressed.

JUDGMENT REVERSED AND CAUSE REMANDED
WITH DIRECTIONS.

HEBEL AND HALL, JJ. CONCUR.

38816

THE PEOPLE OF THE STATE OF ILLINOIS,

Appellant,

v.

FRANK BUDART,

Appellee.

RECORDING CLERK

OF CHICAGO.

38816 I.A. 613

MR. JUSTICE DELIVERED THE

OPINION OF THE COURT.

This case has been consolidated with case No. 38816.

entitled, The People of the State of Illinois v. Frank Budart, in

which case we have today filed an opinion and the law applicable

in that case is controlling here.

For the reasons stated in our opinion in case No. 38816,

the judgment of the Municipal Court finding the defendant not guilty

and discharging said defendant is hereby reversed and the case is

remanded for a new trial with directions to that court to state its

petition of the defendant and proceed and set aside the order setting

aside the previous order of conviction and enter an order remanding

the defendant to the custody of the Superintendent of the House of

Correction to complete his sentence and when such order is made

may be necessary which are not inconsistent with the laws herein

expressed.

JUDGES: JUSTICE AND JUSTICE
WILL DELIVER.

HEARD AND FILED, 22. OCTOBER.

38843

ROBERT PRUITT,

Appellee,

v.

ADOLPH STAUDENRAUS,

Appellant.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

287 I.A. 614¹

MR. PRESIDING JUSTICE DENIS E. SULLIVAN DELIVERED THE
OPINION OF THE COURT.

This is an appeal from a judgment entered in the Circuit Court in favor of plaintiff, Robert Pruitt, for the sum of \$5,350.00, being the amount alleged by plaintiff to be due on a contract for the sale of stock in the corporation known as the Adolph Market Company of which 53½ shares of the capital stock, it is claimed was purchased by the defendant, Adolph Staudenraus, from the plaintiff at \$100 a share, but has not been paid for.

The declaration alleges a written contract between plaintiff and defendant as of May 1, 1929, wherein it is alleged that plaintiff was the owner of 53½ shares of the capital stock of the Adolph Market Company, valued at \$100 per share and desired to sell the same to the defendant; that defendant agreed to purchase the 53½ shares of the said stock at \$100 per share and to pay therefor the sum of \$5350.00, \$1,000.00 at the time of signing the contract and the balance of \$4350.00 to be paid in monthly installments of \$100 each beginning June 15, 1929, and continuing each month until fully paid; that the plaintiff Pruitt had endorsed the certificates of stock in blank and it was agreed between the parties that said capital stock certificates so endorsed were to be deposited in escrow with the Old Dearborn State Bank until the balance of \$4350.00 was paid to Pruitt; that upon presentation of

38843

ROBERT FRUIT,

Appellee,

v.

ADOLPH STAUDENHAUS,

Appellant.

CIRCUIT COURT

MADE FROM

DOCK COUNTY.

287 I.A. 614

MR. PRESIDING JUSTICE DENIS E. BULLIVANT DELIVERED THE

OPINION OF THE COURT.

This is an appeal from a judgment entered in the Circuit Court in favor of plaintiff, Robert Fruit, for the sum of \$1,300.00 being the amount alleged by plaintiff to be due on a contract for the sale of stock in the corporation known as the Adolph Market Company of which 53½ shares of the capital stock, it is claimed was purchased by the defendant, Adolph Staudenhause, from the plaintiff at \$100 a share, but has not been paid for.

The declaration alleges a written contract between plaintiff and defendant as of May 1, 1928, wherein it is alleged that plaintiff was the owner of 53½ shares of the capital stock of the Adolph Market Company, valued at \$100 per share and desired to sell the same to the defendant; that defendant agreed to purchase the 53½ shares of the said stock at \$100 per share and to pay therefor the sum of \$5350.00, \$1300.00 at the time of signing the contract and the balance of \$4050.00 to be paid in monthly installments of \$100 each beginning June 15, 1928, and continuing each month until fully paid; that the plaintiff fruit had endorsed the certificates of stock in blank and it was agreed between the parties that said capital stock certificates be endorsed over to be deposited in escrow with the Old Dominion State Bank until the balance of \$4350.00 was paid to fruit; that upon presentation of

receipts or other evidence showing payment of said sum, or upon the signed order of Pruitt the stock was to be delivered to Staudenraus.

It appears from the evidence that while said stock was being held by the bank, by some prior arrangement the purpose of which is not clear from the evidence, the defendant Straudenraus entered into a written contract with plaintiff whereby the defendant did agree to purchase said 53 $\frac{1}{2}$ shares of the stock from the plaintiff for the sum of \$5,350.00 to be paid for as follows:

"One Thousand Dollars (\$1,000.00) to be paid upon the signing of the contract, One Hundred Dollars (\$100.00) on the fifteenth (15th) day of June, 1929, and One Hundred Dollars (\$100.00) on the fifteenth (15th) day of each and every month thereafter until paid."

The defendant contends by his plea and affidavit of merits that when the said document set up in plaintiff's declaration was signed by the defendant, the defendant informed the plaintiff and the plaintiff agreed and consented thereto; that the signing of the same was conditional upon defendant's right to enter into such agreement and that he would advise the plaintiff the following morning if said agreement was not in conflict with a prior agreement between the stockholders of the Adolph Market Company and the defendant; that the morning following the signing of the document defendant notified the plaintiff that he could not go through with the transaction because it was in violation of a prior written agreement between the stockholders of said company; that defendant has never had possession or control of the said shares of stock and admits that he has not paid any part of the money as specified in the alleged agreement and does not owe the same because of the fact that said contract was not completely executed, was only signed and was not to become binding until the defendant informed the plaintiff if it would not be in conflict with said contract between

receipts or other evidence showing payment of said sum, or upon the signed order of Transit the stock was to be delivered to Transcontinental. It appears from the evidence that while said stock was being held by the bank, by some prior arrangement and the purpose of which is not clear from the evidence, the defendant Transcontinental entered into a written contract with plaintiff whereby the defendant did agree to purchase said 25% shares of the stock from the plaintiff for the sum of \$5,500.00 to be paid for as follows:

"One Thousand Dollars (\$1,000.00) to be paid upon the signing of the contract, One Hundred Dollars (\$100.00) on the fifteenth (15th) day of June, 1923, and One Hundred Dollars (\$100.00) on the fifteenth (15th) day of each and every month thereafter until paid."

The defendant contends by his plea and affidavits of merits that when the said document set up in plaintiff's declaration was signed by the defendant, the defendant informed the plaintiff and the plaintiff agreed and consented thereto; that the signing of the same was conditional upon defendant's right to enter into such agreement and that he would advise the plaintiff the following morning if said agreement was not in conflict with a prior agreement between the stockholders of the Gold Market Company and the defendant; that the morning following the signing of the document defendant notified the plaintiff that he could not go through with the transaction because it was in violation of a prior written agreement between the stockholders of said company; that defendant has never had possession or control of the said shares of stock and admits that he has not paid any part of the money so specified in the alleged agreement and does not owe the same because of the fact that said contract was not legally executed, was only signed and was not to become binding until the defendant informed the plaintiff if it would not be in conflict with said contract between

the said stockholders of said company; that no amount ever became due to the plaintiff from the defendant upon said contract.

The contract in full reads as follows:

"THIS AGREEMENT made and entered into by and between ADOLPH STAUDENRAUS of Chicago, Cook County, Illinois, party of the first part, and ROBERT FRUITT of Chicago, Cook County, Illinois, party of the second part,

W I T N E S S E T H :

Whereas, the party of the second part is the owner of fifty three and one-half ($53\frac{1}{2}$) shares of the capital stock of the Adolph Market Company, a corporation, of the par value of One hundred (\$100.00) dollars per share, and desired to sell the same to said party of the first part and the party of the first part desired to purchase the same on the terms and conditions hereinafter set forth.

NOW THEREFORE, for and in consideration of the premises the parties hereto agree as follows:

FIRST: The party of the second part does hereby sell and the party of the first part does hereby buy said fifty-three and one-half ($53\frac{1}{2}$) shares of the capital stock of the Adolph Market Company and the party of the first part agrees to pay therefor the sum of Fifty-three hundred fifty (\$5350.00) dollars; said payments to be made as follows: One thousand (\$1,000.00) dollars to be paid on the signing of this contract, the receipt whereof is hereby acknowledged, and the balance to-wit: the sum of Forty-three hundred Fifty dollars (\$4350.00) to be paid as follows: One hundred (\$100.00) dollars on the 15th day of June, A. D. 1929, and One hundred (\$100.00) dollars on the 15th day of each and every month thereafter until the total amount of said Forty-three hundred fifty (\$4350.00) dollars is fully paid.

SECOND: Said party of the second part has endorsed the certificates representing the said fifty three and one-half ($53\frac{1}{2}$) shares of the capital stock of the Adolph Market Company in blank and it is hereby understood by and between the parties hereto that said capital stock certificates so endorsed in blank are hereby deposited in escrow with the "Old Dearborn State Bank" as escrowee, to be held by said escrowee until the entire amount of Forty three hundred Fifty dollars (\$4350.00) is paid to said Party of the second part and the said escrowee is hereby directed to hold said certificates until said sum of Forty three hundred Fifty dollars (\$4350.00) is fully paid and said escrowee is hereby directed to deliver the said certificates totaling fifty three and one-half ($53\frac{1}{2}$) shares of said stock to the party of the first part upon the presentation by said party of the first part of receipts or other evidence showing the payment of said sum of Forty three hundred fifty (\$4350.00) dollars or upon the signed order of said party of the second part.

THIRD: The party of the first part shall have the right to pay at any time all the balance remaining unpaid or any amount thereof in excess of said monthly installments stipulated.

the said stockholders of said company; what no amount ever received due to the inability from the defendant upon a bid contract.

The contract in full reads as follows:

"THIS AGREEMENT made and entered into by and between ADOLPH STAMBERG of Chicago, Cook County, Illinois, party of the first part, and ROBERT FRANK of Chicago, Cook County, Illinois, party of the second part,

WITNESSETH:

Whereas, the party of the second part is the owner of fifty three and one-half (53½) shares of the capital stock of the Adolph Market Company, a corporation of the State of Illinois, the par value of one hundred (\$100.00) dollars per share, and desired to sell the same to said party of the first part and the party of the first part desired to purchase the same on the terms and conditions hereinafter set forth.

Now KNOW ALL MEN by these presents that the parties hereto agree as follows:

FIRST: The party of the second part does hereby sell and the party of the first part does hereby buy said fifty-three and one-half (53½) shares of the capital stock of the Adolph Market Company and the party of the first part agrees to pay therefor the sum of fifty-three hundred fifty (\$5350.00) dollars; said payments to be made as follows: One thousand (\$1,000.00) dollars to be paid on the signing of this contract; the receipt whereof is hereby acknowledged; and the balance to-wit: the sum of forty-three hundred fifty dollars (\$4350.00) to be paid as follows: One hundred (\$100.00) dollars on the 15th day of June, A. D. 1928, and one hundred (\$100.00) dollars on the 15th day of each and every month thereafter until the total amount of said forty-three hundred fifty (\$4350.00) dollars is fully paid.

SECOND: Said party of the second part has endorsed the certificates representing the said fifty three and one-half (53½) shares of the capital stock of the Adolph Market Company in blank and it is hereby understood by and between the parties hereto that said capital stock certificates so endorsed in blank are hereby deposited in escrow with the said Adolph Market Company, to be held up, said escrow until the entire amount of forty three hundred fifty dollars (\$4350.00) is paid to said party of the second part and the said escrow is hereby directed to hold said certificates until said sum of forty three hundred fifty dollars (\$4350.00) is fully paid and said escrow is hereby directed to deliver the said certificates to said party of the first part when the full amount of said forty three hundred fifty (\$4350.00) dollars or upon the first order of said party of the second part.

THIRD: The party of the first part shall have the right to pay at any time all monies remaining unpaid or any amount thereof in excess of said monthly installments when

dated.

FOURTH: It is further understood and agreed by and between the parties hereto that in the event that said Adolph Market Company shall sell its leasehold interest in the building now occupied by it at the North east corner of Lake and State Street, Chicago, Illinois, at any time prior to and including May 1st, 1932, then and in that event the party of the second part shall receive in addition to said sum of Fifty three hundred fifty (\$5350.00) dollars hereinabove referred to a pro rata share in the distribution of the proceeds from said leasehold sale, if any, after the payment of all indebtedness; said pro rata to be computed on the basis of fifty three and one-half ($53\frac{1}{2}$) shares to five hundred (500) shares now outstanding.

FIFTH: This contract shall be binding upon the heirs, administrators, executors and assigns of the parties hereto.

IN WITNESS WHEREOF the said parties have hereto affixed their hands and seals this 1st day of May, A. D. 1929.

Adolph Staudenraus (SEAL)
Robert Pruitt (SEAL)"

From the facts as set forth in the briefs and abstract it is difficult to determine the theory of either side in this case. At the time of the trial nothing was said about the delivery of the stock, which is the consideration and the subject-matter for the payment of the money. According to the evidence, as near as we can fathom, the stock is still being held by the bank as collateral for a loan. The evidence indicates that the certificates of stock were offered in evidence at the time of the trial, but we have searched the record and have been unable to find them. The contract offered in evidence by plaintiff acknowledges receipt of the payment of \$1,000.00 but nothing is said in this court by either side concerning the same.

No reason is offered why the defendant Staudenraus should not pay his obligation. He signed the contract and delivered it to the other side and, as before stated, the briefs and abstract do not give us any information as to the rest of the transaction. The court instructed the jury orally, in accordance with an agreement of all the parties concerned, and the record further shows that both

FOURTH: It is further understood and agreed by and between the parties hereto that in the event that said Adolph Wolff Company shall sell its business and interest in the building now occupied by it at the north-west corner of Lake and State Streets, Chicago, Illinois, at any time prior to and including July 1st, 1927, then and in that event the party of the second part shall receive in addition to said sum of fifty thousand dollars fifty (\$50,000) dollars hereinafter referred to as and which share in the distribution of the proceeds from said leasehold sale, if any, after the payment of all indebtedness; said proceeds to be computed on the basis of fifty three and one-half (53½) shares to five hundred (500) shares now outstanding.

FIFTH: This contract shall be binding upon the heirs, administrators, executors and assigns of the parties hereto.

IN WITNESS WHEREOF the said parties have hereunto affixed their hands and seals this 1st day of May, A.D. 1926.

Adolph Staudacher as (SEAL)
Robert Trust (SEAL)

From the facts as set forth in the briefs and exhibits it is difficult to determine the theory of either side in this case. At the time of the trial nothing was said about the delivery of the stock, which is the consideration and the subject-matter for the payment of the money. According to the evidence, as much as we can gather, the stock is still being held by the bank as collateral for a loan. The evidence indicates that the certificate for the stock were offered in evidence at the time of the trial, but we have returned the record and have been unable to find them. The contract offered in evidence by plaintiff acknowledges receipt of the payment of \$1,000.00 but nothing is said in this court by either side concerning the same.

So reason is offered why the defendant Staudacher should not pay his obligation. He signed the contract and delivered it to the other side and, as before stated, the parties had agreed to not give us any information as to the rest of the transaction. The court instructed the jury usually, in accordance with an agreement of all the parties concerned, and the record further shows that both

parties were satisfied with the instructions and offered no suggestions to the court as to any error that he might have committed. Consequently, they are precluded from now raising such question in this court.

Finding no reversible error in the trial of the cause the judgment of the Circuit Court is affirmed.

JUDGMENT AFFIRMED.

HEBEL AND HALL, JJ. CONCUR.

parties were satisfied with the instructions and offered no suggestions to the court as to any error that he might have committed. Consequently, they are precluded from now raising such question in this court.

Finding no reversible error in the trial of the cause the judgment of the Circuit Court is affirmed.

JUDGMENT AFFIRMED.

HEBES AND HALL, JJ. CONCUR.

38513

THE FIRST NATIONAL BANK OF CHICAGO,
as Trustee,

Appellee,

v.

VITO MARZANO, et al.,

On Appeal of PETER MARZANO, Adminis-
trator DE BONIS NON with the Will
Annexed of the Estate of CATHERINE
MARZANO, Deceased,

Appellant.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

287 I.A. 614²

MR. JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

By this appeal Peter Marzano, Administrator de bonis non with the will annexed of the estate of Catherine Marzano, deceased, seeks the reversal of a decree entered on July 12th, 1935, in a foreclosure proceeding brought by the First National Bank of Chicago, as trustee, against Vito Marzano, Catherine Marzano and others.

The trust deed in question is dated July 31st, 1926, and was executed by Hovakim B. Shekerjian and Anna Shekerjian, his wife, and conveyed to the trustee certain real estate described therein, and was given to secure the payment of a bond issue, evidencing a debt of \$77,500.00. The decree appealed from contains the usual findings and provisions ordinarily contained in a foreclosure decree of this character. In addition, the decree finds, as alleged in the bill filed in the cause, that Catherine Marzano, in her lifetime, personally assumed and agreed to pay the indebtedness secured by the trust deed, and directs that in the event the premises are not sold for a sufficient amount to pay the debt found to be due by the decree, that a deficiency decree be entered against Peter Marzano, administrator de bonis non with the will annexed of the estate of Catherine Marzano, deceased, for any

THE FIRST NATIONAL BANK OF CHICAGO,

as Trustee,

Appellee,

v.

VITO MARZANO, et al.,

On Appeal of PETER MARZANO, Adminis-
trator DE BONIS NOW with the Will
Annexed of the Estate of CATHERINE
MARZANO, Deceased,

Appellant.

Cook County.

CHICAGO

CHICAGO

287 I.A. 614

MR. JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

By this appeal Peter Marzano, Administrator DE BONIS NOW with the Will Annexed of the Estate of CATHERINE MARZANO, Deceased, seeks the reversal of a decree entered on July 12th, 1935, in a foreclosure proceeding brought by the First National Bank of Chicago, as trustee, against Vito Marzano, Catherine Marzano and others.

The trust deed in question is dated July 21st, 1934, and was executed by Hovakim B. Shekerjian and Anna Shekerjian, his wife and conveyed to the trustee certain real estate described therein, and was given to secure the payment of a bond issue, evidencing a debt of \$77,500.00. The decree appealed from contains the usual findings and provisions ordinarily contained in a foreclosure decree of this character. In addition, the decree finds, as alleged in the bill filed in the case, that Catherine Marzano, in her lifetime, personally assumed and agreed to pay the indebtedness secured by the trust deed, and directs that in the event the premises are not sold for a sufficient amount to pay the debt found to be due by the decree, that a deficiency decree be entered against Peter Marzano, Administrator DE BONIS NOW with the Will Annexed of the Estate of Catherine Marzano, Deceased, for any

deficiency found to be due the complainant after the confirmation of the master's report of sale and distribution. The decree was entered upon a report of a master in chancery of the Circuit Court of Cook County. The trustee named in the trust deed is the First Trust & Savings Bank. However, the record shows that the First National Bank of Chicago, complainant, has by virtue of merger and consolidation, and by appropriate action, become successor trustee to the trustee named in the trust deed.

The record indicates that subsequent to the recording of the trust deed in question, and on March 1st, 1928, Hovakim B. Shekerjian and his wife, Anna Shekerjian, by warranty deed, conveyed the premises to one Grant M. Rhode; that on May 15th, 1928, Rhode conveyed the premises to James M. Hillcoat and Tillie Hillcoat, his wife, who, on June 27th, 1929, conveyed by warranty deed to Charles F. Krieter and Marie Krieter. All these conveyances were filed for record in the office of the Recorder of Cook County, and in none of them is there any statement or recital to the effect that the grantees therein agreed to assume and pay the indebtedness secured by the trust deed. On February 7th, 1930, an agreement was entered into by and between Vito Marzano and Catherine Marzano, his wife, and Charles F. Krieter and Marie Krieter, his wife, wherein and whereby it was agreed that the Marzanos would convey to the Krieters certain premises not involved in this proceeding, and that the Krieters would convey to the Marzanos the premises here involved, subject, among other things, to an unpaid balance of \$71,500.00, secured by the trust deed already referred to. This contract recites in detail the amounts and due dates of the various unpaid balances. By this contract, in addition to the provision for the exchange of properties, the Marzanos agreed to pay to the Krieters the sum of \$18,700.00 in cash. It is further recited

Kristers the sum of \$18,700.00 in cash. It is further recited for the exchange of properties, the parties agreed to pay to the unpaid balances. By this contract, in addition to the provision contract recites in detail the amounts and dates of the various \$71,800.00, secured by the trust deed already referred to. This involved, subject, among other things, to an unpaid balance of and that the Kristers would convey to the Kuznos the premises heretofore certain premises not involved in this proceeding, wherein and whereby it was agreed that the Kuznos would convey his wife, and Charles F. Kristers and Marie Kristers, his wife, entered into by and between Vito Kuznos and Catherine Kuznos, by the trust deed. On February 7th, 1930, an agreement was granted therein agreed to assume and pay the indebtedness secured of them is there any statement or recital to the effect that the record in the office of the Recorder of Cook County, and in none F. Kristers and Marie Kristers. All these conveyances were filed for wife, who, on June 27th, 1928, conveyed by warranty deed to Charles conveyed the premises to James M. Hillcoat and Willie Elliscot, his the premises to one Grant M. Rhodes; that on May 15th, 1928, deeds Sherkertian and his wife, Anna Sherkertian, by warranty deed, conveyed the trust deed in question, and on March 1st, 1928, Nov-Kris B. The record indicates that subsequent to the recording of to the trustee named in the trust deed, consolidation, and by appropriate action, become successor trustee National Bank of Chicago, complainant, has by virtue of merger and Trust & Savings Bank. However, the record shows that the first of Cook County. The trustee named in the trust deed is the first entered upon a report of a master in chancery of the Circuit Court of the master's report of sale and distribution. The decree was delinquency found to be due the complainant after the confirmation

that the consideration for the entering into the contract, is the exchange of these properties upon the terms above mentioned and "the sum of \$10.00 and other good and valuable consideration".

On February 7th, 1930, the Krieters executed and delivered to Vito Marzano and Catherine Marzano a warranty deed to the premises in question in joint tenancy. This deed contains the following recital:

"This deed is given subject to taxes levied after the year 1927, and subject also to a trust deed dated July 31, 1926, recorded as Dec. 9368567, to First Trust & Savings Bank securing an unpaid balance of bonds aggregating Seventy One Thousand Five Hundred (\$71,500.00) Dollars which said second parties assume and agree to pay."

The bill to foreclose was filed on November 21st, 1932, and alleges, among other things, the execution and delivery of the deed to the premises by the Krieters to the Marzanos, their acceptance of the deed, and as already suggested, an allegation to the effect that the Marzanos thereby assume, agreed to pay, and became liable for the debt. The Marzanos were served with summons in the foreclosure suit on December 1st, 1932, and on March 21st, 1933, a default order was entered against them for want of an answer. On this last mentioned date the cause was referred to a master in chancery to hear proofs as to the allegations in the bill, and on April 10th, 1933, the master's report was made, which recites that upon proof taken and received by him, the complainant in the bill was entitled to the relief prayed, and the master made a finding to the effect that by the acceptance of the deed hereinbefore referred to by which the Marzanos acquired title to the premises in question, the Marzanos assumed and agreed to pay the mortgage debt, and were personally liable for any deficiency.

Subsequent to the report of the master made on May 22nd, 1932, both of the Marzanos died - Vito died in August, 1933, and Catherine in September, 1933. By reason of the fact that the

that the consideration for the entering into the contract, in the exchange of these properties upon the terms above contained, and "the sum of \$10.00 and other good and valuable consideration." On February 7th, 1930, the Krieters executed and delivered to Vito Marzano and Catherine Marzano a warranty deed to the premises in question in joint tenancy. This deed contained the following recital:

"This deed is given subject to taxes levied after the year 1927, and subject also to a trust deed dated July 31, 1926, recorded as Doc. 326828V, to First Trust & Savings Bank amounting to an unpaid balance of bonds aggregating seventy one thousand five hundred (\$15,500.00) Dollars which said second parties assume and agree to pay." The bill to foreclose was filed on November 21st, 1932, and alleges, among other things, the execution and delivery of the deed to the premises by the Krieters to the Marzanos, their acceptance of the deed, and as already suggested, an allegation to the effect that the Marzanos thereby assumed, agreed to pay, and become liable for the debt. The Marzanos were served with summons in the foreclosure suit on December 1st, 1932, and on March 1st, 1933, a default order was entered against them for want of an answer. On this last mentioned date the cause was referred to master in chancery to hear proofs as to the allegations in the bill, and on April 10th, 1933, the master's report was made, which recited that upon proof taken and received by him, the complainant in the bill was entitled to the relief prayed, and the master made a finding to the effect that by the acceptance of the deed hereinbefore referred to by which the Marzanos acquired title to the premises in question, the Marzanos assumed and agreed to pay the mortgage debt, and were personally liable for any delinquency. Subsequent to the report of the master made on May 10th, 1933, both of the Marzanos died - Vito died in August, 1933, and Catherine in September, 1933. By reason of the fact that the

Marzanos held the title in joint tenancy, upon the death of Vito, the title became vested in Catherine. On November 17th, 1933, an amended and supplemental bill was filed by the complainant, wherein the death of the Marzanos was alleged, together with the fact of the appointment of Joseph Marzano, as executor of the last will and testament of Catherine Marzano, deceased, and this amended and supplemental bill makes Joseph Marzano and the heirs or devisees of Catherine Marzano, parties defendant to the bill. Joseph Marzano was duly served with summons, but filed no answer to the bill. He died on December 21st, 1933.

On January 6th, 1934, Peter Marzano, defendant here, who theretofore had been appointed administrator de bonis non with the will annexed of Catherine Marzano, deceased, together with the devisees under her will, filed answers to the bill of complaint, as amended, by Monahan & Monahan, their solicitors, and who are also solicitors for defendant here, in which there is no denial of the fact that when the Marzanos acquired title to the premises in question from the Krieters, they assumed and agreed to pay the debt. Thereafter, on January 29th, 1934, the cause was again referred to the master for a hearing on the amended bill and answer filed, and on March 29th, 1934, a hearing was had before the master on the amended bill and answer of Peter Marzano. On May 18th, 1934, the master made a supplemental report, wherein he approved and ratified all the findings made in the original report dated May 22nd, 1933, and the record shows that thereafter notice of this report was given to all the parties in the case, and that no objections were filed thereto. On June 9th, 1934, pursuant to a written notice given to the parties defendant, the plaintiff appeared in court, presented the master's report, and asked that an order be entered approving the report, and that a decree of sale be entered in conformity therewith. On that date the court entered an order,

Martinez held the title in joint tenancy, upon the death of Wife, the title became vested in Catherine. On November 17th, 1932, an amended and supplemental bill was filed by the complainant, wherein the death of the Martinez was alleged, together with the fact of the appointment of Joseph Martinez, as executor of the last will and testament of Catherine Martinez, deceased, and this amended and supplemental bill makes Joseph Martinez and the heirs or devisees of Catherine Martinez, parties defendant to the bill. Joseph Martinez was duly served with summons, but filed no answer to the bill. He died on December 21st, 1933.

On January 6th, 1934, Peter Martinez, defendant here, who theretofore had been appointed administrator de bonis non with the will annexed of Catherine Martinez, deceased, together with the devisees under her will, filed answers to the bill of complaint as amended, by Monahan & Monahan, their solicitors, and who are also solicitors for defendant here, in which there is no denial of the fact that when the Martinez occurred title to the premises in question from the Kriesters, they assumed and agreed to pay the debt. Thereafter, on January 23rd, 1934, the court was again referred to the master for a hearing on the amended bill and answer filed, and on March 23rd, 1934, a hearing was had before the master on the amended bill and answer of Peter Martinez. On May 18th, 1934, the master made a supplemental report, wherein he approved and ratified all the findings made in the original report dated May 1933, and the record shows that thereafter notice of this report was given to all the parties in the case, and that no objections were filed thereto. On June 6th, 1934, pursuant to a written notice given to the parties defendant, the plaintiff appeared in court, presented the master's report, and asked that an order be entered approving the report, and that a decree of sale be entered in conformity therewith. On that date the court entered an order,

continuing the cause to June 11th, 1934. On June 11th, 1934, the date to which the motion above referred to was continued, the court entered the following order:

"This cause again coming on to be heard on complainant's motion for leave to file the Master's report and supplemental report herein, and for the entry of a decree in conformity therewith, and on due notice, and the Court being fully advised in the premises, It is therefore ordered that leave be and leave is hereby given complainant to file the Master's Report and Supplemental report herein instantler, together with all exhibits herein. It is further ordered that complainant's motion for the entry of a decree as aforesaid be and the same is hereby continued generally."

On June 11th, 1934, the date of this last mentioned order, Peter Marzano, as administrator de bonis non with the will annexed of Catherine Marzano, deceased, filed his petition in which he sought to have the entire cause reopened, and that leave be given him to present proofs on the question of the personal liability of Catherine Marzano, deceased, or of Peter Marzano, as administrator as aforesaid. To this petition a demurrer was filed, together with a motion to strike the petition, which motion was denied. On July 10th, 1934, the court entered an order to the effect that this petition stand as an amendment to the answer of the defendants here, and that the cause be referred to the master for the sole purpose of determining whether or not Catherine Marzano, or her estate, were liable to pay the debt mentioned. After hearing proofs, the master found the facts with reference to the question herein involved, and reported the same to the court together with his recommendations, which report is in part, as follows:

"That an exchange of properties was made in March, 1930, between Charles Krieter and wife, and the defendants, Vito and Catherine Marzano; that the transaction for the exchange of said property (which included the conveyance of the premises herein to the Marzanos) was consummated at the Novak-Steiskal Bank; that said Krieters, grantors in said deed, delivered the same to Vito Marzano; that Catherine

continuing the cause to June 11th, 1934. On June 11th, 1934, the date to which the motion above referred to was continued, the court entered the following order:

"This cause being coming on to be heard on complainant's motion for leave to file the Master's report and supplemental report herein, and for the entry of a decree in conformity therewith, and on the notice, and the Court being fully advised in the premises, it is therefore ordered that leave be and leave is hereby given complainant to file the Master's report and supplemental report herein instant, together with all exhibits herein. It is further ordered that complainant's motion for the entry of a decree as aforesaid be and the same is hereby continued generally."

On June 11th, 1934, the date of this last mentioned order Peter Marxano, as administrator de bonis non with the will annexed of Catherine Marxano, deceased, filed his petition in which he sought to have the entire cause reopened, and that leave be given to present proofs on the question of the personal liability of Catherine Marxano, deceased, or of Peter Marxano, as administrator as aforesaid. To this petition a return was filed, together with a motion to strike the petition, which motion was denied. On July 10th, 1934, the court entered an order to the effect that this petition stand as an amendment to the answer of the defendants here and that the cause be referred to the master for the sole purpose of determining whether or not Catherine Marxano, or her estate, was liable to pay the debt mentioned. After hearing proofs, the master found the facts with reference to the question herein involved, and reported the same to the court together with his recommendations, which report is in part, as follows:

"That an exchange of properties was made in March, 1930, between Charles Krister and wife, and the defendants, Vito and Catherine Marxano; that the transaction for the exchange of said property (which included the conveyance of the premises herein to the Marxanos) was consummated at the Novak-Stetskal bank; that said Krister, previous to said deed, delivered the same to Vito Marxano; that Catherine

Marzano was present in the bank at said time, but not in the room where the delivery was made; that Vito Marzano, however, acted in said transaction as her duly authorized agent, and after the execution and delivery of said deed, the Marzanos took possession of the premises described therein.

That the Marzanos were represented at said time in the transactions for the exchange by Mr. Novak or Mr. Steiskal, each of whom was an official of said bank; that a so-called closing statement was present at said time when the exchange of said property was consummated, and a copy of said instruments in writing delivered to Mr. Blake, the attorneys for the Krieters, and a copy was delivered to said Novak or Steiskal, as the representatives of the Marzanos, and thereafter retained in the files of said bank; that said statement is dated March 4, 1930, bears the name Vito Marzano at the top, and contains certain figures and provisions evidencing that the purchase price of the premises herein was fixed at the sum of \$90,200.00, and that (after allowing for certain other deductions and adjustments) the sum of \$71,500.00 representing the unpaid balance of the indebtedness secured by the Trust Deed herein, was deducted from said purchase price; that said deduction from said purchase price is preceded by the following notation on said closing statement 'By first mortgage issue assumed.'

That the unpaid balance of the indebtedness secured by the Trust Deed herein was deducted by the Marzanos from the purchase price which they paid to the grantors of said premises, and that a sufficient sum of money to discharge said debt was deducted from said purchase price and retained by the Marzanos for the purpose of paying the indebtedness.

That thereafter Vito Marzano acted as the duly authorized agent of his wife, in managing and collecting the income from the premises; that she left the management of said property to his care and supervision; that he applied the income from the premises toward the payment of interest and principal on the indebtedness secured by said Trust Deed; that after they received title to said premises under said deed, bonds 13 to 18 both inclusive each in the sum of \$500.00 secured by the Trust Deed herein, matured on August 1, 1930, and were duly paid and cancelled; that interest matured on August 1, 1930, and February 1, 1931, after they secured title to said premises, and were duly paid and cancelled; that the defendants, Peter Marzano, et al., admit in their petition of June 10, 1934, that Vito Marzano collected the income from the premises and applied the same in payment of interest and principal on the debt, and that said acts in collecting income from said premises and making payment therewith in reduction of the debt secured by the Trust Deed were authorized by and binding upon Catherine Marzano.

That on November 30, 1932, the Marzanos executed an instrument in writing agreeing that the First Union Trust and Savings Bank, as Trustee under the Trust Deed, could forthwith take possession of the premises to avoid the court receivership, and on November 30, 1932, as a part of the same transaction, the First Union Trust and Savings Bank, as Trustee, executed a notice to the tenants in the building claiming the rents, and attached

Mr. Werners was present in the bank at said time, but not in the room where the delivery was made; that Vito Werners, however, acted in said transaction as her duly authorized agent, and after the execution and delivery of said deed, the Werners took possession of the premises described therein.

That the Werners were represented at said time in the transactions for the exchange by Mr. Novak or Mr. Gatskiel, each of whom was an official of said bank; that a so-called closing statement was presented at said time when the exchange of said property was consummated, and a copy of said instruments in writing delivered to Mr. Biele, the attorney for the Kistner, and a copy was delivered to said Novak or Gatskiel, as the representative of the Werners, and thereafter retained in the files of said bank; that said statement is dated March 4, 1930, bears the name Vito Werners at the top, and contains certain figures and provisions evidencing that the purchase price of the premises herein was fixed at the sum of \$20,800.00, and that (after allowing for certain other deductions and adjustments) the sum of \$1,800.00 representing the unpaid balance of the indebtedness secured by the Trust Deed herein, was deducted from said purchase price; that said deduction from said purchase price is preceded by the following notation on said closing statement: 'By first mortgage issue assumed.'

That the unpaid balance of the indebtedness secured by the Trust Deed herein was deducted by the Werners from the purchase price which they paid to the vendors of said premises, and that a sufficient sum of money to discharge said debt was deducted from said purchase price and retained by the Werners for the purpose of paying the indebtedness.

That thereafter Vito Werners acted as the duly authorized agent of his wife, in making and collecting the income from the premises; that she left the management of said property to his care and supervision; that he applied the income from the premises toward the payment of interest and principal on the indebtedness secured by said Trust Deed; that after they received title to said premises under said deed, bonds in to \$18,000.00 secured by the Trust Deed herein, matured on August 1, 1930, and were duly paid and cancelled; that interest matured on August 1, 1930, and February 1, 1931, after they secured title to said premises, and were duly paid and cancelled; that the balance, Peter Werners, et al., exist in their petition of June 10, 1934, that Vito Werners collected the income from the premises and applied the same in payment of interest and principal on the debt, and that said note in collecting income from said premises and making payment thereon in redemption of the debt secured by the Trust Deed were authorized by and binding upon Catherine Werners.

That on November 30, 1932, the Werners executed an instrument in writing reciting that the First Union Trust and Savings Bank, as trustee under the Trust Deed, could forthwith take possession of the premises to avoid the court proceedings, and on November 30, 1932, as a part of the same transaction, the First Union Trust and Savings Bank, as trustee, executed a notice to the tenants in the building occupying the premises, and attached

to said notice was a written consent of the Marzanos thereto.

That the execution of said instruments by the Marzanos, by the terms of which they agreed that the trustee take possession of and manage said premises, evidences conduct indicating an acceptance of the assumption clause in said Warranty Deed; that said contract on the part of said parties negates repudiation of said clause, but is evidence of its acceptance by said parties, and that the execution of said instruments in writing corroborates a recognition by the Marzanos of the existence of said assumption clause and their acceptance thereof.

That the contention of the defendants that said assumption clause was inserted in said deed by mistake or inadvertence is not supported by the evidence.

That the Marzanos, after deducting the unpaid balance of the debt secured by the Trust Deed from the purchase price of the premises, and the delivery of the Warranty Deed to them; took possession of the premises, collected the rents therefrom, made payments therewith on account of the indebtedness secured by the Trust Deed; that Catherine Marzano entrusted the management and supervision of said premises to Vito, and the various acts of Vito in receiving the said Warranty Deed from the grantors entering into possession of the premises and collecting the rents and making payments on account of said debt, were binding upon Catherine; that after entering into possession, neither Vito nor Catherine repudiated the said clause in said deed under the terms of which they assumed and agreed to pay the debt; that said payments by Marzanos on account of said mortgage debt negated repudiation of said assumption clause, in said deed and evidenced conduct indicating acceptance of said clause, and that Catherine Marzano was personally liable for the payment of said debt."

The "closing statement" referred to in this report is as follows:

"William L. O'Connell
Receiver for
Novak & Steiskal State Bank
Suite 200 - 1106 West Thirty Fifth Street
Telephone: Boulevard 4810
Chicago

M. A. Hagel
Deputy Receiver
Vito Marzano

March 4, 1930

By purchase of real estate at South West Corner Magnolia and Rosemont Avenues (North East Corner Vernon Park and Aberdeen, given as part payment) Net . . .	\$90,200.00
Due to Mr. Krieter for insurance for unexpired time , , , , ,	366.52
Pro-rata taxes 1928 and 1929 on Marzano property allowed Krieter	421.80

\$90,988.32

to said notice was a written consent of the Marzano

thereof.

That the execution of said instruments by the Marzano, by the terms of which they agreed that the private sale of said premises, evidence contained in said instruments, indicating an acceptance of the assumption clause in said instrument; that said contract on the part of said parties parties repudiation of said clause, but is evidence of its acceptance by said parties, and that the execution of said instruments in writing constitutes a recognition by the Marzano of the existence of said assumption clause and their acceptance thereof.

That the contention of the defendants that said assumption clause was inserted in said deed by mistake or inadvertence is not supported by the evidence.

That the Marzano, after deducting the unpaid balance of the debt secured by the Trust Deed from the purchase price of the premises, and the delivery of the 'rents' used to them, took possession of the premises, collected the rents therefrom, made payments thereon on account of the indebtedness secured by the Trust Deed; that Catherine Marzano entrusted the management and supervision of said premises to Vito, and the various acts of Vito in receiving the said rents from the grantors entering into possession of the premises and collecting the rents and making payments on account of said debt, were binding upon Catherine; that after entering into possession, neither Vito nor Catherine repudiated the said clause in said deed under the terms of which they assumed and agreed to pay the debt; that said payments by Marzano on account of said mortgage debt negatived repudiation of said assumption clause, in said deed and evidenced conduct indicating acceptance of said clause, and that Catherine Marzano was personally liable for the payment of said debt."

The "closing statement" referred to in this report is as

follows:

"William L. O'Connell
Receiver for
Hovak & Stataki State Bank
Suite 200 - 1108 West Thirty Fifth Street
Telephone: Romaine 4810
Chicago

M. A. Hovak
Deputy Receiver
Vito Marzano
By purchase of real estate at South West
Corner Madison and Belmont avenues
(North West Corner Vernon Park and
Aberdeen, given as part payment) \$100,000.00
Due to Mr. Krieger for insurance for
unexpired time \$11.85
Property taxes 1928 and 1929 on Marzano
Property taxes Krieger \$11.85

By First Mortgage Bond Issue assumed	\$71,500.00	
Interest allowed Marzano by Kreiter on above from February 1, 1930 to March 1, 1930	357.50	
Insurance premium rebated to Marzano on property given in exchange	47.20	\$71,904.70
Due Kreiter for Property 1928 and 1929 taxes on Kreiter Property held in escrow . .	4,368.50	4,368.50
Balance due Kreiter		\$14,715.12
Paid by Marzano by cash . . .		14,715.12

Closed Out".

It was identified by ~~an officer of the bank~~ and was admitted in evidence.

Plaintiff contends that the consideration for the conveyance of the premises in question by the Krieters to the Marzanos was the conveyance by the Marzanos to the Krieters of the property already referred to, the payment of the sum of \$18,700.00 in cash, and the assumption by the Marzanos of the unpaid balance of the indebtedness secured by the trust deed, which plaintiff contends was deducted from the purchase price; that the warranty deed of the premises was received and accepted by the Marzanos with the recital that it was subject to the trust deed in question, and that, as suggested, the Marzanos assumed and agreed to pay it.

Defendant's contention is that the contract for the exchange of real estate between the Marzanos and the Krieters provided merely for the exchange of what is termed "equities" without regard to the mortgage debt, and that the conveyance was made subject to the unpaid balance; that the insertion in the deed that the Marzanos assumed and agreed to pay the debt was made without the knowledge of Catherine Marzano; that she never made any payment on account of principal and interest of the bonds issued and secured by the trust deed, and that by no act on her part did she assent to, or ratify the statement in the deed, or agree to pay the amount of the bonds.

by First Mortgage Bond Issue
Assumed \$1,500.00
Interest allowed Marzano by
Krieter on above from
February 1, 1930 to March 1,
1930 17.50
Insurance premium reported to
Marzano on property given
in exchange 17.50

\$1,535.00

19,385.42

4,385.50

1,715.12

1,715.12

Closed Out.

Due Krieter for Property
1928 and 1929 taxes on Krieter
Property held in escrow \$4,385.50
Balance due Krieter
Paid by Marzano by cash

It was identified ~~as the property of the estate~~ and was

admitted in evidence.

Plaintiff contends that the consideration for the conveyance of the premises in question by the Krieters to the Marzanos was the conveyance by the Marzanos to the Krieters of the property already referred to, the payment of the sum of \$18,700.00 in cash, and the assumption by the Marzanos of the unpaid balance of the indebtedness secured by the trust deed, which Plaintiff contends was deducted from the purchase price; that the warranty deed of the premises was received and accepted by the Marzanos with the understanding that it was subject to the trust deed in question, and that as suggested, the Marzanos agreed and agreed to pay it.

Defendant's contention is that the contract for the exchange of real estate between the Marzano and the Krieter provided merely for the exchange of what is termed "realities" without regard to the mortgage debt, and that the conveyance was made subject to the unpaid balance; that the insertion in the deed that the Marzano assumed and agreed to pay the debt was made without the knowledge of Catherine Marzano; that she never made any payment on account of principal and interest of the bonds issued and secured by the trust deed, and that by no act on her part did she assent to, or ratify the statement in the deed, or agree to pay the amount of the bonds.

The testimony taken before the master, as set forth in his report, indicates that the deal between the Marzanos and the Krieters was made in the Novak-Steiskal State Bank in Chicago, and that there were present at the time the deal was closed, the Kreiters, the Marzanos, an official of the bank, and several other persons.

John A. Blake, an attorney-at-law, who represented the Krieters at this time, and who was produced as a witness by defendant, testified to the effect that the cash paid was counted in his presence, and that he turned the deed over to the Marzanos. He also testified to the effect that there were two of the so-called "closing statements" before the parties at the time the deal was closed, one of which was retained by the bank, and one by the witness; that Blake's copy was destroyed, and that the copy received in evidence and already referred to, was retained by the bank. This witness also testified to the effect that when the deal was closed between the Krieters and the Marzanos, there was exhibited a copy of the contract entered into between the Krieters and the Marzanos, that Marzano procured from a vault in the bank the cash to pay on account of the transaction in question, that the money was counted out in the presence of the witness, and that the witness said to Marzano, "Look at the contract, and see if all the conditions of the contract are complied with;" that the witness then delivered the deed from the Krieters to ~~the~~ Marzanos, and his wife. This witness also testified that at the time the transaction was closed, there was no discussion with relation to the assumption of the debt by the Marzanos. On his cross examination, this witness testified to the effect that at the time the deal was closed, the Marzanos were present and were represented by one of the officers of the bank; that he saw a closing statement when the deal was closed, and that

The testimony taken before the master, as set forth in his report, indicates that the deal between the Marzano and the Kristera was made in the Novel-Stetaki State Bank in Chicago, and that there were present at the time the deal was closed, the Kristera, the Marzano, an official of the bank, and several other persons.

John A. Blake, an attorney-at-law, who represented the Kristera at this time, and who was produced as a witness by defendant, testified to the effect that the cash paid was counted in his presence, and that he turned the deed over to the Marzano. He also testified to the effect that there were two of the so-called "closing statements" before the parties at the time the deal was closed, one of which was retained by the bank, and one by the witness; that Blake's copy was destroyed, and that the copy retained in evidence and already referred to, was retained by the bank. This witness also testified to the effect that when the deal was closed between the Kristera and the Marzano, there was exhibited a copy of the contract entered into between the Kristera and the Marzano, that Marzano procured from a vault in the bank the cash to pay on account of the transaction in question, that the money was counted out in the presence of the witness, and that the witness said to Marzano, "Look at the contract, and see if all the conditions of the contract are complied with;" that the witness then delivered the deed from the Kristera to the Marzano, and his wife. This witness also testified that at the time the transaction was closed, there was no discussion with relation to the assumption of the debt by the Marzano. On his cross examination, this witness testified to the effect that at the time the deal was closed, the Marzano were present and were represented by one of the officers of the bank, that he saw a closing statement when the deal was closed, and that

a copy of the so-called closing statement was seen by this witness at this time. The witness further stated that he could not say whether or not the document introduced in evidence was or was not the copy of such statement so exhibited and referred to.

The record also shows that after the Marzanos came into possession of the property in question, certain interest payments on the indebtedness secured by the trust deed in question became due on August 1st, 1930, February 1st, 1931, August 1st, 1931 and February 1st, 1932, and that such interest payments were all made by the Marzanos. Also, that the principal on two of such bonds for \$500.00 each became due and payable on August 1st, 1930 and August 1st, 1931, and that both were paid by the Marzanos. Whether they were paid by Vito or Catherine Marzano, the record does not indicate.

After the filing of the original bill, and after the motion for the appointment of a receiver of the property had been made by the complainant, and on November 30th, 1932, the Marzanos executed an instrument which was acknowledged before Robert J. Monahan, a notary public and one of the solicitors for defendant in the instant case. This document recites, among other things, the making of the trust deed by the Shekerjians on July 31st, 1926, the defaults in the payment of principal and interest on the bonds, the filing of the bill to foreclose, and the statement by the Marzanos that they are desirous of avoiding the expense of a receivership, and that they consented that the successor trustee, the complainant here, take possession of the property, collect the rents and make certain disbursements in connection with the management of the property. Among other things contained in this instrument is the following:

"It is hereby agreed that said successor trustee shall have the right to remain in possession of said above described premises and property and to collect the rents, issues and profits therefrom, notwithstanding the entry of any decree of foreclosure in any foreclosure proceedings to

a copy of the so-called closing statement was seen by this witness at this time. The witness further stated that he could not say whether or not the document introduced in evidence was or was not the copy of such statement so exhibited and related to.

The record also shows that after the Marmon case into possession of the property in question, certain interest payments on the indebtedness secured by the trust deed in question became due on August 1st, 1930, February 1st, 1931, August 1st, 1931 and February 1st, 1932, and that such interest payments were all made by the Marmones. Also, that the principal on two of such bonds for \$500.00 each became due and payable on August 1st, 1930 and August 1st, 1931, and that both were paid by the Marmones. Whether they were paid by Vito or Catherine Marmon, the record does not indicate.

After the filing of the original bill, and after the note for the appointment of a receiver of the property had been made by the complaint, and on November 20th, 1932, the Marmones executed an instrument which was acknowledged before Robert L. Monahan, a notary public and one of the solicitors for defendant in the instant case. This document recites, among other things, the filing of the trust deed by the Sherkstons on July 31st, 1932, the details of the payment of principal and interest on the bonds, the filing of the bill to foreclose, and the statement by the Marmones that they are desirous of avoiding the expense of a receivership, and that they consented that the successor trustee, the complainant, may take possession of the property, collect the rents and make certain disbursements in connection with the management of the property.

Among other things contained in this instrument is the following:

"It is hereby agreed that said successor trustee shall have the right to remain in possession of said land as described and to collect the rents and profits thereon, notwithstanding the entry of any decree of foreclosure in any foreclosure proceeding to

foreclose the lien of said trust deed, and notwithstanding any sale of said above described property pursuant to any such decree, and it is hereby agreed that the said successor trustee shall have full power and authority to remain in possession of said property although it shall not be required to do so until the expiration of the period of redemption from any such sale, provided a deficiency decree is entered in any foreclosure proceedings.

It is further agreed that the net rents, issues and profits after the payment of all expenses, including reasonable trustee's fees, accruing after the sale of the above described premises and property pursuant to such decree, shall be applied by the said successor trustee from time to time during the period in which possession of said property shall be held by the said successor trustee in partial satisfaction of any deficiency decree."

The law applicable to the case at bar is well stated in the case of Lange v. Bartlett, 207 Ill. ^{App.} 422, where this court said:

"We think the law is well settled that where a deed of property is made subject to an existing mortgage, the words 'subject to,' in the absence of anything in the context which would throw a light upon the intention of the parties, do not, in themselves, show an intention on the part of the grantee to assume the mortgage, and that in such case the intent of the parties is a question of fact to be established by the evidence."

In that case, the defendant, in an action brought to foreclose a mortgage on property owned by her, and prior to the beginning of the foreclosure proceeding and in an effort to forestall such a proceeding, entered into a contract with the mortgagee by which the mortgagor agreed to sell the property upon the following terms, as stated by the court in its opinion:

"At the price of \$4,790 * * * subject to (1) existing leases; (2) all taxes levied after the year of 1907; unpaid special assessments levied for improvements not yet made, and to encumbrance of \$4,000 due October, 1911, at 6 per cent interest; special assessment for paving Calumet avenue, not exceeding \$100.' Afterwards, a deed was made which conveyed the property at a stated consideration of \$6,000, subject to a mortgage dated October 10, 1905, given to secure a note in the sum of \$4,000 and to taxes levied for the year 1907, and all taxes and special assessments levied for improvements not yet made. Before the conveyance was made, Ida Hoskins, at the instance of the appellant, secured an extension of the mortgage for three years by the payment of \$90, which he advanced.

The appellant's agent, at the time of the transaction, prepared the following statement:

'Chicago, Dec. 7, 1908.

Mrs. Ida Hoskins
a.c 292 E. 38th St.

foreclose the lien of said trust deed, and notwithstanding any sale of said above described property pursuant to any such decree, and it is hereby agreed that the said trustee shall have full power and authority to retain in possession of said property although it shall not be necessary to do so until the expiration of the period of redemption from any such sale, provided a deficiency decree is entered in any foreclosure proceedings.

It is further agreed that the said trustee, its assigns and assigns after the payment of all expenses, including reasonable trustee's fees, accounting after the sale of the above described premises and property pursuant to such decree, shall be applied by the said successor trustee from the time during the period in which possession of said property shall be held by the said successor trustee in partial satisfaction of any deficiency decree."

The law applicable to the case at bar is well settled in the case of Lance v. Bartlett, 207 Ill. 483, App.

"We think the law is well settled that where a deed of property is made subject to an existing mortgage, the words 'subject to' in the absence of anything in the context which would throw a light upon the intention of the parties, do not, in themselves, show an intention on the part of the grantee to assume the mortgage, and that in such case the intent of the parties is a question of fact to be established by the evidence."

In that case, the defendant, in an action brought to foreclose mortgage on property owned by her, and prior to the beginning of the foreclosure proceeding and in an effort to forestall such proceeding, entered into a contract with the mortgagee by which the mortgagee agreed to sell the property upon the following terms as stated by the court in its opinion:

"At the price of \$4,700 * * * subject to (1) existing lease; (2) all taxes levied after the year of 1907; and (3) special assessments levied for improvements not yet made, and to encumbrance of \$4,000 due October 1911, at a nominal interest; special assessment for paving streets owned, not exceeding \$100. Afterwards, a deed was made which conveyed the property at a stated consideration of \$4,700, subject to a mortgage dated October 19, 1905, given to secure a note in the sum of \$4,000 and to taxes levied for the year 1907, and all taxes and special assessments levied for improvements not yet made. Before the conveyance was made, the defendant, at the instance of the appellant, secured an extension of the mortgage for three years by the payment of \$500, which was advanced.

The appellant's agent, at the time of the transaction, prepared the following statement:

'Chicago, Dec. 7, 1907.
Mrs. Ida Hoskins
232 E. 38th St.
Chicago, Ill.

Fred'k Bartlett & Co.

Real Estate

Phone Central 4857

100 Washington Street

Equity

\$790

Ins. Prem

13

Deposit

\$90

Survey

10

Costs in suit 264191

7.40

Int. on inc. 10 10 12/6

37.57

Spl. Asst. excess over \$100

27.34

Contn. of Abat. & Redg.

11.95

Rent to 12/31

20.15

598.49

\$803.00 \$803.00' "

In confirming a decree of foreclosure, the court said:

"When, then the parties enumerated the liens that the property was 'subject to' and included only those tax and special assessment liens that the grantee was to be liable for, and excluded those that the grantor was to be liable for, they conclusively show that they were enumerating the items which the grantee was to assume. Among these was the mortgage in question. We are, therefore of the opinion that a proper construction of the words of the contract itself places the obligation to discharge the mortgage squarely on the appellant."

Here, we not only have the provision in the deed, the testimony as to the facts and circumstances surrounding the execution of the contract and deed, but we are confronted with the additional fact that after the bill to foreclose the mortgage was filed and the Marzanos had been served with summons in the case and during their lifetime, they allowed a default to be entered against them, and at no time denied that they had assumed and agreed to pay the mortgage as a part of the consideration of the conveyance of the property to them, as alleged in the bill. In addition to the above, we call attention to the fact that in the agreement for the trustee to manage the property in lieu of a receiver, it is shown that they anticipated the probability of a deficiency judgment against them.

In Rogers v. Herron, et al., 92 Ill. 583, the Supreme Court said:

"It is a clear proposition, that where a person purchases real estate incumbered by a mortgage, and as a part of the consideration agrees to pay and discharge the incumbrance, such contract creates a personal liability, which the courts will always enforce. "

We are of the opinion that all of the surrounding circumstances in this case, including the conduct of the Marzanos and the evidence in the case, indicate clearly that when the Marzanos bought this land, that as a part of the purchase price, they assumed and agreed to pay this mortgage indebtedness. The decree of the Circuit Court of Cook County is affirmed.

AFFIRMED.

DENIS E. SULLIVAN, P.J. AND HEBEL, J. CONCUR.

We are of the opinion that all of the surrounding cir-

umstances in this case, including the conduct of the parties and the evidence in the case, indicate clearly that when the parties bought this land, that as a part of the purchase price, they assumed and agreed to pay this mortgage indebtedness. The facts of the Circuit Court of Cook County is affirmed.

ATTESTED.

JOHN E. BULLIVANT, J. L. AND HENRY, J. CONCUR.

38526

KAREL SUP,

Appellee,

v.

CZECH LADIES BENEVOLENT SOCIETY,

Appellant.

14
APPEAL FROM

CIRCUIT COURT

OF CHICAGO.

287 I.A. 614³

MR. JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

This is an appeal by the Czech Ladies Benevolent Society from a judgment obtained against the society in the Circuit Court of Cook County in an action brought by Karel Sup, plaintiff. The action is predicated upon the following certificate, issued by defendant on December 1st, 1930:

*CERTIFICATE OF MEMBERSHIP-WHOLE LIFE.

By this Certificate Witnesseth: That for and in consideration of the payment of One Dollar and Fifteen Cents (\$1.15) and the payment of an equal amount on or before the last day of each month hereafter as long as the member named herein shall live, and the further payment of all Central Committee, Grand Lodge and Subordinate Lodge dues as provided for in the Articles of Incorporation, Constitution and Laws, Rules and Regulations of the Czech Ladies Benevolent Society, now in force or hereafter adopted, Sup, Catherina, a member of Frantiska Gregorova Lodge No. 47 located at Chicago in the State of Illinois, is entitled to all the privileges of membership in the Czech Ladies Benevolent Society, and in case of death of said member while in good standing therein and this Certificate is maintained in full force.

Central Committee of the Czech Ladies Benevolent Society of Ohio promises and binds itself to pay out of its Mortuary Fund to Karel Sup related to said member as Husband (subject to the Member's right to change the beneficiary) sum of Six Hundred Dollars, which sum, subject to the requirements, privileges and provisions of the application of said member, the Articles of Incorporation, Constitution and Laws, Rules and Regulations of this Society, now in force or hereafter enacted, all of which are made a part of this contract, and subject to all conditions precedent, shall be paid after satisfactory proofs of such member's death shall have been furnished, and upon surrender of this Certificate. This Certificate, the application for membership and medical examination, the Articles of Incorporation, Constitution and Laws, Rules and Regulations of this Society, now in force or which may hereafter be enacted or adopted, shall together constitute the contract between the Society, the member and the beneficiary. This Certificate is issued and accepted upon the express conditions, agreements, and warranties contained in the Certificate, the application for membership and answers by the member to the medical examiner. * * *

KAREL SUP,

Appellee,

APPEAL FROM

CIRCUIT COURT

v.

CZECH LADIES BENEVOLENT SOCIETY,

Appellant.

OF CHICAGO.

387 I.A. 614

MR. JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

This is an appeal by the Czech Ladies Benevolent Society from a judgment obtained against the society in the Circuit Court of Cook County in an action brought by Karel Sup, plaintiff. The action is predicated upon the following certificate, issued by the Society on December 1st, 1930:

"CERTIFICATE OF MEMBERSHIP-WHOLE LIFE."

By this Certificate Witnesseth: That for and in consideration of the payment of One Dollar and Fifteen Cents (\$1.15) and the payment of an equal amount on or before the last day of each month hereafter as long as the member named herein shall live, and the further payment of all Central Committee, Grand Lodge and Subordinate Lodge dues as provided for in the Articles of Incorporation, Constitution and Laws, Rules and Regulations of the Czech Ladies Benevolent Society, now in force or hereafter adopted, Sup, Catherine, a member of Frantiska Gregorova Lodge No. 47 located at Chicago in the State of Illinois, is entitled to all the privileges of membership in the Czech Ladies Benevolent Society, and in case of death of said member while in good standing therein and this certificate is maintained in full force.

Central Committee of the Czech Ladies Benevolent Society of Ohio promises and binds itself to pay out of its treasury fund to Karel Sup related to said member as Husband (subject to the member's right to change the beneficiary) sum of Six Hundred Dollars, which sum, subject to the requirements, privileges and provisions of the application of said member, the Articles of Incorporation, Constitution and Laws, Rules and Regulations of this Society, now in force or hereafter enacted, all of which are made a part of this contract, and subject to all conditions precedent, shall be paid after satisfactory proof of such member's death shall have been furnished, and upon surrender of this Certificate. This Certificate, the application for membership and medical examination, the Articles of Incorporation, Constitution and Laws, Rules and Regulations of this Society, now in force or which may hereafter be enacted or adopted, shall together constitute the contract between the society, the member and the beneficiary. This Certificate is issued and accepted upon the express conditions, agreements, and warranties contained in the Certificate and the application for membership and answers by the member to the medical examination.

The assured died on February 8th, 1933, at about the hour of 12:15 o'clock in the afternoon of that day. Upon a claim being presented under this certificate, the society declined to pay on the ground that the insured had forfeited her membership therein for non-payment of dues. Plaintiff insists that the beneficiary had kept and performed all of the terms of the contract. Defendant maintains that the insured was expelled under the constitution and by-laws of the society for the non-payment of dues for the months of October, November and December, 1932, and that this expulsion from the order took place at a meeting of the society on January 12th, 1933; that at that time no payments had been received on behalf of the insured for assessments in accordance with the provisions of the certificate, since September 8th, 1932; that on February 9th, 1933, the day after the death of the insured, the secretary of the society received an American Express Money Order for \$4.20, and that immediately thereafter defendant returned it to plaintiff; that thereafter and on December 8th, 1932, a postcard was mailed by the secretary of the society to Catherina Sup, in and by which she was informed that she was in arrears in the sum of \$2.80, that there was also assessments due of \$1.15 and \$.25, making a total due of \$4.20, and that this sum must be paid at the next meeting of the society to be held on December 8th, 1932; that on February 8th, 1933, the plaintiff, husband of the insured, went to a drug store and secured an American Express Money Order in the sum of \$4.20, and mailed it, together with the postcard referred to which was sent to the insured. The envelope in which this money order was mailed is in evidence, and shows it to be postmarked at 3 p.m. February 8th, 1933. The records of the society show that Catherina Sup was expelled from the society on January 12th, 1933, for non-payment of dues.

The insured died on February 8th, 1933, at about the hour of 12:15 o'clock in the afternoon of that day. Upon a claim being presented under this certificate, the society declined to pay on the ground that the insured had forfeited her membership therein for non-payment of dues. Plaintiff insists that the beneficiary had kept and performed all of the terms of the contract. Defendant maintains that the insured was expelled under the constitution and by-laws of the society for the non-payment of dues for the months of October, November and December, 1932, and that this expulsion from the order took place at a meeting of the society on January 13th, 1933; that at that time no payments had been received on behalf of the insured for assessments in accordance with the provisions of the certificate, since September 8th, 1932; that on February 3rd, 1933, the day after the death of the insured, the secretary of the society received an American Express Money Order for \$4.30, and that immediately thereafter defendant returned it to plaintiff; that thereafter and on December 8th, 1932, a postcard was mailed by the secretary of the society to Catherine Gup, in and by which she was informed that she was in arrears in the sum of \$8.35, and that there were also assessments due of \$1.15 and .25, making a total due of \$4.30, and that this sum must be paid at the next meeting of the society to be held on December 8th, 1932; that on February 8th, 1933, the plaintiff, husband of the insured, went to a drug store and secured an American Express Money Order in the sum of \$4.30, and mailed it, together with the postcard referred to which was sent to the insured. The envelope in which this money order was mailed is in evidence, and shows it to be postmarked at 3 p.m. February 8th, 1933. The records of the society show that Catherine Gup was expelled from the society on January 13th, 1933, for non-payment of dues.

Defendant's position is as stated, that the insured, having been expelled from the society for non-payment of dues, ^{therefore defendant} is not liable. In reply to defendant's plea of non assumpsit, plaintiff filed a replication in which it is alleged that on February 8th, 1933, prior to the death of the insured, the defendant, through its duly authorized officers and agents, received for and on account of Catherine Sup the sum of \$4.20 for the monthly assessments and contributions due the defendant for the months of October, November and December, 1933, and that by its accepting such payments, the defendant waived its laws, rules and regulations, and that prior to February 8th, 1933. In this replication, it is also alleged that prior to the death of the insured, it had been and was the custom of the defendant in regard to the insured and other members of the society, to accept combined monthly assessments and contributions many months in arrears, and that the insured relied upon and depended upon this custom and established practice in delaying until February, 1933, to pay the assessments.

Karel Sup, plaintiff, testified to the effect that at about 8:30 in the morning of the day his wife passed away, he procured a money order made out to Mrs. Rose Kaderabek, that he enclosed the money order in an envelope, addressed it to Mrs. Rose Kaderabek at 2124 S. Cuyler Ave., Berwyn, Ill., placed a stamp on it and dropped it in a mail box, and that the money order was never returned to him. On cross-examination, he stated that he purchased the money order in the morning, and that his wife died in the afternoon, and that he never received it back by registered mail, that he does not remember signing any receipt for a registered letter sent him by Mrs. Rose Kaderabek, but that he would not say that he did not. He then further stated that he did not remember getting it back.

Defendant's position is as stated, that the insured, having
therefore defendant
been expelled from the society for non-payment of dues, is not liable
In reply to defendant's plea of non est, plaintiff filed a
replication in which it is alleged that on February 8th, 1935, prior
to the death of the insured, the defendant, through its duly authorized
fixed officers and agents, received for and on account of contributions
and the sum of \$4.30 for the monthly assessments and contributions
due the defendant for the months of October, November and December,
1935, and that by its accepting such payments, the defendant waived
its laws, rules and regulations, and that prior to February 8th, 1935,
In this replication, it is also alleged that prior to the death of
the insured, it had been and was the custom of the defendant in regard
to the insured and other members of the society, to accept combine
monthly assessments and contributions many months in advance, and
that the insured relied upon and depended upon this custom and
established practice in delaying until February, 1935, to pay the
assessments.

Karel Aug. Plaintiff, testified to the effect that at about
8:30 in the morning of the day his wife passed away, he procured a
money order made out to Mrs. Rose Kaderbek, that he enclosed the
order in an envelope, addressed it to Mrs. Rose Kaderbek at 1114
S. Gwyler Ave., Berwyn, Ill., placed a stamp on it and dropped it in
a mail box, and that the money order was never returned to him.
On cross-examination, he stated that he purchased the money order
the morning, and that his wife died in the afternoon, and that he
never received it back by registered mail, that he does not remember
signing any receipt for a registered letter sent him by Mrs. Rose
Kaderbek, but that he would not say that he did not. He then further
stated that he did not remember getting it back.

Rose Kaderabek, a witness produced by the defendant, testified, in substance, that she was the financial secretary of the defendant society; that after receiving the money order referred to, she placed it in an envelope, addressed it to Mr. Sup, took it to a sub-postal station in Cicero and had it registered. The receipt of plaintiff for the registered letter was then received in evidence.

Defendant also introduced in evidence the envelope in which the money order was received by defendant, addressed to Mrs. Rose Kaderabek, 2124 S. Cuyler Ave., Berwyn, Ill., upon which there is a stamped legend which indicates that the same was mailed in Cicero on February 8th, 1933, at 3 p.m. It is not disputed that this is the envelope containing the money order which plaintiff sent to defendant. In his brief and argument, plaintiff does not deny that such is the fact. His principal point urged for sustaining the judgment seems to be that inasmuch as the defendant had, on various occasions, received dues after the date on which they should have been paid, it is estopped to urge that she thereby forfeited her membership in the society. It seems to be admitted by plaintiff that on December 6th, 1932, a postal card was mailed to Catherine Sup, the insured, informing her that she was in arrears at that time in assessments and dues in the sum of \$4.20, and that this sum must be paid on or before the next meeting of the society to be held on December 8th, 1932. On this same document, there was also a notice to the effect, that the dues were for three months, and that unless they were paid, the insured would be expelled. Following this on January 12th, 1933, the insured was expelled from the society for non-payment of dues. It is not denied that on various previous occasions, the defendant had received dues after the time for the payment had expired. Defendant offered in evidence the by-laws of this society, one of which provides as follows:

Rose Kaderbek, a witness produced by the defendant, testified, in substance, that she was the financial secretary of the defendant society; that after receiving the money order referred to she placed it in an envelope, addressed it to Mr. Guy, took it to a sub-postal station in Chicago and had it registered. The receipt of plaintiff for the registered letter was then received in evidence. Defendant also introduced in evidence the envelope in which the money order was received by defendant, addressed to Mrs. Rose Kaderbek, 2124 S. Ogley Ave., Chicago, Ill., upon which there is a stamped legend which indicates that the same was mailed in Chicago on February 25th, 1933, at 3 p.m. It is not denied that this is the envelope containing the money order which plaintiff now holds. In his brief and argument, plaintiff does not deny that such is the fact. His principal point urged for sustaining the judgment seems to be that inasmuch as the defendant had, on various occasions, received dues after the date on which they should have been paid, it is estopped to urge that she thereby forfeited her membership in the society. It seems to be admitted by plaintiff that on December 8th, 1932, a postal card was mailed to Chicago, the insured, informing her that she was in arrears at that time in assessments and dues in the sum of \$4.30, and that this sum was paid on or before the next meeting of the society to be held on December 8th, 1932. On this same document, there was also a notation to the effect, that the dues were for three months, and that unless they were paid, the insured would be expelled. Following this on January 15th, 1933, the insured was expelled from the society for non-payment of dues. It is not denied that on various previous occasions, the defendant had received dues after the time for the payment had expired. Defendant offered in evidence the by-laws of this society, one of which provides as follows:

"Rights and Duties of Members. Members must pay all dues and assessments at Lodge meetings and at least one month in advance.

A delinquent member shall receive notice, but failure to receive notice is no excuse. For delinquency through the next succeeding Lodge meeting she shall be suspended from all benefits other than those reserved to her in her certificate; her suspension shall be recorded in the minutes of the Lodge meeting and official notice thereof sent to the Supreme Lodge. For delinquency through the second Lodge meeting after payment is due the member is automatically expelled. The Lodge shall notify the Supreme Lodge of such expulsion.

Member who has been expelled for non-payment may be reinstated on payment of all dues and assessments and the expense of suspension within thirty days. After thirty days, the members may be reinstated only upon making such payment and satisfactory medical examination for which she pays."

The court refused to admit this by-law upon the ground, as we understand from the record, that it had been adopted after her admission to the society.

We call attention to the following provision of this certificate:

"This Certificate, the application for membership and medical examination, the Articles of Incorporation, Constitution and Laws, Rules and Regulations of this Society now in force or which may hereafter be enacted, or adopted, shall together constitute the contract between the Society, the member and the beneficiary."

We are of the opinion that the court was in error in refusing to admit this by-law in evidence.

In Steen v. Modern Woodmen, 296 Ill. 104, page 110, the Supreme Court said:

"A person who enters an association must acquaint himself with its laws, for they contribute to the admeasurement of his rights, his duties and his liabilities. Where, as here, there is an express and clear reservation of the right to amend he is bound to take notice of the existence and effect of that reserved power. The power to exact by-laws is inherent in every corporation as an incident of its existence. This power is a continuous one, and no one has a right to presume that by-laws will remain unchanged. Where the contract contains an express provision reserving the right to amend or change by-laws it cannot be doubted that the society has the right so to do, and where in the contract of insurance it is provided that members shall be bound by the rules and regulations now governing the society or that

"Rights and Duties of Members. Members must pay all dues and assessments at lodge meetings and at least one month in advance.

A delinquent member shall receive notice, but failure to receive notice is no excuse. For delinquency through the next succeeding lodge meeting she shall be suspended from all benefits other than those reserved to her in her certificate; her suspension shall be recorded in the minutes of the lodge meeting and official notice thereof sent to the Supreme Lodge. For delinquency through the second lodge meeting after payment is due the member is automatically expelled. The lodge shall notify the Supreme Lodge of such expulsion.

Member who has been expelled for non-payment may be reinstated on payment of all dues and assessments and the expense of suspension within thirty days. After thirty days, the members may be reinstated only upon making such payment and satisfactory medical examination for which she pays."

The court refused to admit this by-law upon the ground, as we understand from the record, that it had been adopted after her admission to the society.

We call attention to the following provision of this

certificate:

"This Certificate, the application for membership and medical examination, the Articles of Incorporation, Constitution and Laws, Rules and Regulations of this Society now in force or which may hereafter be enacted or adopted, shall together constitute the contract between the Society, the member and the beneficiary."

We are of the opinion that the court was in error in refusing to admit this by-law in evidence.

In Ward v. Modern Lodge, 200 Ill. 10, 11, 12, 13, the

Supreme Court said:

"A person who enters an association must accept himself with its laws, for they contribute to the advancement of his rights, his duties and his liabilities. There is here, there is an express and clear reservation of the right to amend and he is bound to take notice of the existence and effect of that reserved power. The power to exact by-law is inherent in every corporation as an incident of its existence. This power is a continuous one, and no one has a right to presume that by-laws will remain unchanged. There is no doubt that by-laws are a necessary part of the contract containing an express provision reserving the right to amend or change by-laws it cannot be doubted that the society has the right so to do, and where in the contract of insurance it is provided that members shall be bound by the rules and regulations now governing the society or that

may thereafter be enacted for such government, and those conditions are assented to and the member accepts the benefit certificate under the conditions provided therein, it is a sufficient reservation of the right in the society to amend or change its by-laws."

In Knights and Ladies of America v. Weber, 101 Ill. App.

488, this court said:

"The evidence offered by appellant of the existence of its rules and by-laws should have been admitted. This evidence consisted of a pamphlet printed in German, and which appellant offered to have translated to the court and jury; and also to show that copies thereof had been in force from 1895 to and during the year 1898, and were circulated among all the members of the order who spoke the German language and desired them, and among others, Louis Weber, the insured.

Publications of a mutual insurance company, generally circulated among its members, and purporting to contain its rules and by-laws, are admissible as prima facie evidence of such rules and by-laws."

The record clearly shows that prior to her death, the insured had been expelled from the society for non-payment of dues, and it is not shown that she protested and the record further indicates, and it is not seriously disputed, that the money order for the payment of her dues was mailed after her death. The judgment of the Circuit Court is reversed.

REVERSED.

DENIS E. SULLIVAN, P.J. AND HEBEL, J. CONCUR.

may thereafter be enacted for such government, and these conditions are suggested to and the member accepts the benefit certificate under the conditions provided therein, it is a sufficient reservation of the right in the society to amend or change its by-laws."

In Knights and Ladies of America v. Weber, 101 Ill. 2d.

488, this court said:

"The evidence offered by appellant of the existence of the rules and by-laws should have been admitted. This evidence consisted of a pamphlet printed in German, and which appellant offered to have translated to the court and jury; and also to show that copies thereof had been in force from 1898 to and during the year 1899, and were circulated among all the members of the order who spoke the German language, and besides them, and among others, Louis Weber, the insured. Publications of a mutual insurance company, generally circulated among its members, and purporting to contain its rules and by-laws, are admissible as prima facie evidence of such rules and by-laws."

The record clearly shows that prior to her death, the insured had been expelled from the society for non-payment of dues, and it is not shown that she protested and the record further indicates, and it is not seriously disputed, that the money order for the payment of her dues was mailed after her death. The judgment of the Circuit Court is reversed.

REVERSED.

DENIS E. SULLIVAN, P. J. AND HERBERT J. CONROY.

38529

FRANK C. RATHJE, as Successor Trustee
under an Indenture of Trust, dated
as of August 1, 1927,

Appellant,

v.

CLARENCE SERB, et al.,

Appellee.

COMMITTEE FOR THE PROTECTION OF THE
HOLDERS OF THE FOREMAN TRUST AND
SAVINGS BANK, as Trustee, FIRST
MORTGAGE PARTICIPATION CERTIFICATES,
consisting of BUET C. HARDENBROOK,
WILLIAM T. BRUCKNER, A. H. SELZ and
DAVID B. STERN,

Appellant,

v.

CLARENCE SERB, et al.,

Appellees.

CONSOLIDATED APPEALS

FROM SUPERIOR COURT

COOK COUNTY.

287 I.A. 614⁴

MR. JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

This case is governed by the opinion in case No. 38501.

REVERSED.

DENIS E. SULLIVAN, P.J. AND HEBEL, J. CONCUR.

38233

FRANK G. WATKINS, as Successor Trustee
under an Indenture of Trust, dated
as of August 1, 1937,

Appellant,

v.

CLARENCE BOND, et al.,

Appellees.

COMMITTEE FOR THE PROTECTION OF THE
HOLDERS OF THE WILSON TRUST AND
SAVINGS BANK, as Trustee, FIRST
MORTGAGE PARTITION CERTIFICATE,
constituted of WENT G. HARDENBROOK,
WILLIAM T. STUCKER, A. M. BARN and
DAVID B. STERN,

Appellant,

v.

CLARENCE BOND, et al.,

Appellees.

MR. JUSTICE ELLI DELIVERED THE OPINION OF THE COURT.

This case is governed by the opinion in case No. 38201.

REVEREND.

DEWE E. SMITH, J. J. AND KENNY, J. CONGRESS.

CONSOLIDATED STATE

FROM UNIVERSITY

BOOK COMPANY.

387 I.A. 614

No. 38550

JOSEPH P. KORNACKE, Administrator of
the Estate of FLORENCE KORNATOWSKI,
Deceased,

Appellant,

v.

CORNELIUS BLOMSETH and ARTHUR ANDERSON,

Appellees.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY

287 I.A. 615

MR. JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

Plaintiff, as Administrator of the Estate of Florence Kornatowski, deceased, brought suit in the Circuit Court of Cook County to recover damages said to have been sustained through the alleged negligent act of the defendants, which, it is claimed, caused the death of the intestate. The intestate died on February 5th, 1933, in Chicago. She left surviving her husband and a number of children.

The accident in question happened on Fullerton Avenue near Campbell Avenue, in the city of Chicago, on December 3rd, 1932, at about 8 or 8:30 o'clock in the evening. The negligence charged is that the defendant Blomseth, through his agent, Arthur Anderson, carelessly, negligently and improperly operated his car, and that the intestate suffered the injury from which she died. Two occurrence witnesses, one George Ebelbach and Charles Carey, testified for the plaintiff. The only occurrence witness offered on behalf of the defendant was Arthur Anderson, one of the defendants here, who was the driver of the car at the time and place in question. Objection was offered to his testimony, the objection was sustained, and he was not allowed to testify.

George Ebelbach testified to the effect that he was sitting in a parked car belonging to his brother-in-law, Charles Carey, directly opposite and across the street from the place where the acci-

No. 28250

JOSEPH P. KORNACKI, Administrator of
the Estate of FLORENCE KORNACKI,
Deceased,

Appellant,

v.

CORNELIUS BLOMSTH and ARTHUR ANDERSON,

Appellees.

287 I.A. 615

MR. JUSTICE HALL DIVERGED THE OPINION OF THE COURT.

Plaintiff, as Administrator of the Estate of Florence Kornacki, deceased, brought suit in the Circuit Court of Cook County to recover damages said to have been sustained through the alleged negligent act of the defendants, which, it is claimed, caused the death of the intestate. The intestate died on February 24, 1932, in Chicago. She left surviving her husband and a number of children. The accident in question happened on Fullerton Avenue near Campbell Avenue, in the city of Chicago, on December 27, 1931, at about 8 or 8:30 o'clock in the evening. The negligence charged is that the defendant Blomstth, through his agent, Arthur Anderson, carelessly, negligently and improperly operated his car, and that the intestate suffered the injury from which she died. Two occurrences witnessed, one George Habelsch and Charles Carey, testified for the plaintiff. The only occurrence witness offered on behalf of the defendant was Arthur Anderson, one of the defendants here, who was the driver of the car at the time and place in question. Objection was offered to his testimony, the objection was sustained, and he was not allowed to testify.

George Habelsch testified to the effect that he was sitting in a parked car belonging to his brother-in-law, Charles Carey, directly opposite and across the street from the place where the acci-

dent occurred. He described Fullerton Avenue as having two street car tracks upon it, and that between the car tracks, the roadway is paved with brick, and that opposite the tracks there is a concrete pavement to the north and south thereof, and that the concrete pavements are about 10 feet wide; that on the night in question, it was raining, that he saw the decedent come out of an alley on the opposite side of the street from where the witness was sitting; that he saw the automobile driven by Anderson coming east, and that when he first saw this automobile, it was about a half block west of where it hit the intestate, going about 30 miles an hour; that after the intestate came out of the alleyway, she stopped on the concrete strip and allowed a car to go by, and that the second car (defendant's car) hit her as she was standing about a foot off the concrete strip; that the intestate was struck by the front fender of his car as she was standing still; that he could not say how long she was standing still, that she was thrown east^{and}/a little south about 20 feet and up to the curbstone, that the curbstone was about 4 feet from where she was standing; that when Anderson's car stopped, the back end of it was about 15 feet from where the intestate was lying. On cross-examination, this witness stated that he was 17 years old, that their car had been parked about 10 or 15 minutes before the accident, that he and his brother-in-law were engaged in conversation at the time; that traffic at the time was fairly heavy on Fullerton Avenue, moving both east and west, that it was foggy and the visibility was poor; that he saw the automobile in front of the car that struck the intestate, that both cars were coming along at the same rate of speed; that he did not see the car which struck the intestate change its course; that after leaving the alley, the intestate had about 6 feet to go

dent occurred. He described Ellerton Avenue as having two street car
 tracks upon it, and that between the car tracks, the roadway is paved
 with brick, and that opposite the tracks there is a concrete pavement
 to the north and south thereof, and that the concrete pavements are
 about 10 feet wide; that on the night in question, it was raining,
 that he saw the decedent come out of an alley on the opposite side of
 the street from where the witness was sitting; that he saw the auto-
 mobile driven by Anderson coming east, and that when he first saw this
 automobile, it was about a half block west of where it hit the inter-
 state, going about 30 miles an hour; that after the interstate came
 out of the alleyway, she stopped on the concrete strip and allowed a
 car to go by, and that the second car (defendant's car) hit her as
 she was standing about a foot off the concrete strip; that the in-
 testate was struck by the front fender of his car as she was standing
 still; that he could not say how long she was standing still, that
 she was thrown east^{and} a little south about 20 feet and up to the curb-
 stone, that the curbstone was about 4 feet from where she was stand-
 ing; that when Anderson's car stopped, the back end of it was about
 15 feet from where the interstate was lying. On cross-examination,
 this witness stated that he was 14 years old, that their car had been
 parked about 10 or 15 minutes before the accident, that he and his
 brother-in-law were engaged in conversation at the time; that they
 lie at the time was fairly heavy on Ellerton Avenue, moving both
 east and west, that it was foggy and the visibility was poor; that
 he saw the automobile in front of the car that struck the interstate,
 that both cars were coming along at the same rate of speed; that he
 did not see the car which struck the interstate change its course;
 that after leaving the alley, the interstate had about 8 feet to go

before she reached the concrete curb; that in coming from the alley, she stepped in front of a parked car to the concrete; that at that time the car which struck her was about 35 or 45 feet away; that he could not say whether or not she moved after the first automobile passed her, and that the car which struck her came to a stop about 15 feet from where the intestate was lying.

Charles Carey testified to the effect that he was sitting in a car with Ebelbach, and that he saw the accident in question, that his car was parked about 15 feet east of Campbell Avenue, that it was raining and it was misty; that when he first saw the decedent, she was coming off the sidewalk from the alley; that at that time, there were cars going east and west in the street, that there was a street light about 10 feet from the alley suspended up high so that one could see very well at the time; that the decedent waited for one car to go by, that the second car hit her with its right ^{front} fender, and that at that time, the car was going about 30 miles an hour; that when the decedent was struck, she was thrown about 30 feet, and that the automobile stopped about 20 or 25 feet beyond her. This witness further stated that he did not remember whether the lights on the car were burning or not. On cross-examination, this witness testified that in stating that he did not remember whether the lights on defendant's car were burning or not, he did not mean to convey the idea that they were not burning, that he paid no particular attention to it; that there was nothing unusual about the car as he saw it coming before the accident, that it was coming along following the other traffic, and that there was a distance of about 40 feet between this car and the car in front of it, and that he saw the decedent just before the first car passed her; that as the first car went by, it momentarily obstructed his view. On the testimony of these two fact witnesses, the

before she reached the concrete curb; that in coming from the alley, she stepped in front of a parked car to the concrete; that at that time the car which struck her was about 25 or 45 feet away; that he could not say whether or not she moved after the first automobile passed her, and that the car which struck her came to a stop about 15 feet from where the intestate was lying.

Charles Carey testified to the effect that he was sitting in a car with Kibelbach, and that he saw the accident in question, that his car was parked about 15 feet east of Campbell Avenue, that it was raining and it was misty; that when he first saw the decedent, she was coming off the sidewalk from the alley; that at that time, there were cars going east and west in the street, that there was a street light about 10 feet from the alley suspended up high so that one could see very well at the time; that the decedent waited for one car to go by, that the second car hit her with its right fender, and that at that time, the car was going about 30 miles an hour; that when the decedent was struck, she was thrown about 30 feet, and that the automobile stopped about 30 or 35 feet beyond her. This witness further stated that he did not remember whether the lights on the car were burning or not. On cross-examination, this witness testified that in stating that he did not remember whether the lights on decedent's car were burning or not, he did not mean to convey the idea that they were not burning, that he paid no particular attention to it; that there was nothing unusual about the car as he saw it coming before the accident, that it was coming along following the other traffic, and that there was a distance of about 40 feet between this car and the car in front of it, and that he saw the decedent just before the first car passed her; that as the first car went by, it immediately obstructed his view. On the testimony of these two best witnesses, the

cause was submitted to the jury, which returned a verdict of not guilty.

While the plaintiff makes the statement that the verdict is against the manifest weight of the evidence, an examination of his brief leads us to the conclusion that the principal contention is that the court improperly instructed the jury on behalf of the defendants. The principal instruction complained of, is as follows:

"You are instructed that the law does not permit a person to bring an accident upon herself through her own negligence and then recover against another party, and if you believe from the evidence that the deceased saw, or by the exercise of ordinary care could have seen, the defendants' automobile approaching, and if you further believe from the evidence that she failed to see the defendants' automobile, or that having seen the defendants' automobile, she, nevertheless walked in front of it or placed herself in a position of danger, and if you further believe that such action on her part was negligence which proximately contributed in any degree to the happening of the accident, you must find the defendants not guilty."

At the time of the trial of this case, Section 67 of the Practice Act was in force, which required that specific objections to instructions should be urged before the jury retired, otherwise, they were waived. (Cahill's Illinois Revised Statutes, 1933, Chap. 110, Par. 195.) After the jury had retired, the following colloquy occurred regarding the instructions:

"Mr. Irwin: I want to note an objection to the instruction-
The Court: You are objecting to the instruction. It must be very bad.

Mr. Irwin: This instruction, if the jury believe that the plaintiff was suddenly in a place of danger, the defendant was not required to exercise ordinary care - that degree of care it would otherwise-

The Court: I don't see any reason why you cannot enter a stipulation that all objections be preserved and set forth specifically in the motion for a new trial. That will take care of the whole record.

Mr. Irwin: On the question of the number of instructions winding up not guilty. I want to object to that.

The Court: There are five.

Mr. Irwin: The instructions on damages and contributory negligence-repetition-unduly emphasized those subjects.

The Court: All right, you put in whatever objections you wish to in the record.

cause was submitted to the jury, which returned a verdict of not guilty. While the plaintiff makes the statement that a verdict is against the manifest weight of the evidence, an examination of his brief leads us to the conclusion that the principal contention is that the court improperly instructed the jury on behalf of the defendant. The principal instruction complained of, is as follows:

"You are instructed that the law does not permit a person to bring an accident upon himself through his own negligence and then recover against another party, and if you believe from the evidence that the deceased was, or by his exercise of ordinary care could have seen, the defendant's automobile approaching, and if you further believe from the evidence that she failed to see the defendant's automobile, or that having seen the defendant's automobile, she nevertheless walked in front of it or placed herself in a position of danger, and if you further believe that such action on her part was negligence which proximately contributed in any degree to the happening of the accident, you must find the defendant not guilty."

At the time of the trial of this case, Section 17 of the Practice Act was in force, which provided that specific objections to instructions should be urged before the jury retired, otherwise, they were waived. (Smith's Illinois Revised Statutes, 1925, Chap. 110, Par. 195.) After the jury had retired, the following colloquy occurred regarding the instructions:

"Mr. Irwin: I want to note an objection to the instruction--
The Court: You are objecting to the instruction. It must be very bad.
Mr. Irwin: This instruction, if the jury believe that the plaintiff was suddenly in a place of danger, the defendant was not required to exercise ordinary care - that degree of care it would otherwise--
The Court: I don't see any reason why you cannot enter a stipulation that all objections be preserved and set forth specifically in the motion for a new trial. That will take care of the whole record.
Mr. Irwin: On the question of the number of instructions winding up not guilty. I want to object to that.
The Court: There are five.
Mr. Irwin: The instructions on damages and contributory negligence-repetition-unduly emphasized those subject.
The Court: All right, you put in whatever objections you wish to in the record."

Mr. White: Let's get straightened out on the instructions.

Mr. Irwin: The Court considers that as an oral instruction.

The Court: I do, and I am not going to send it to the jury. Both of you lawyers argued it to the jury. The statute says he may not testify. Your objection is to the substance, Mr. Irwin objected because the Court didn't write it out and send it to the jury.

Mr. Irwin: This new Practice Act is something I don't know anything about. I don't know, that is all. I don't know whether the Practice Act is broad enough to cover that.

The Court: I don't know. I don't think it is really vital as you gentlemen think so.

Mr. Irwin: It would be under the old Practice Act, but I don't know about the new Practice Act.

The Court: There are the ones I refused, three on the matter of duplication. You may note an exception on the part of counsel for the defendant for the refusal. Let the reporters copy them.

Mr. Irwin: So far as the instruction being oral is concerned, you don't object to that?

Mr. White: No.

Mr. Irwin: You and I agree in that particular instance-

The Court: You object to the substance. Note an objection on the part of defendants' counsel to the giving of the first paragraph of the Court's instruction to the jury given orally.

Mr. Irwin: He said he waived it.

Mr. White: I am waiving any objection to giving it orally, but I am objecting to the substance.

The Court: Leave the oral part out.

Mr. White: I am objecting to the substance of the instruction and take exception.

The Court: You object to the repetitions. All right, let the record show that the counsel for the plaintiff objects to the repetition finding defendants not guilty, which appears five times, I checked that." objection to any instructions.

A written motion for a new trial was filed, which contained no specific/

In Thiel v. Material Service Corp., 283 Ill. App. 46, this

court said:

"The defendant urges that the court erred in instructing the jury on the law relating to master and servant and independent contractors. The defendant also questions the giving of a certain instruction presented to the court by the plaintiff as being reversible error. The plaintiff, however, has called to our attention the fact that objections to the instruction were not specific, and under Sec. 67 of the Civil Practice Act and 27 of the Rules of Court, it does not appear that the specific objection to the instruction was made before the jury retired, and by reason of that failure the defendant is in no position to urge that the giving of the instruction was erroneous.

People v. Schneider, 360 Ill. 43; People v. Reeves, 360 Ill. 55; Paulick v. National Bank of the Republic, 279 Ill. App. 160; and Greer v. Shell Petroleum Corp., 281 Ill. App. 238."

In People v. Schneider, 360 Ill. 43, the same question arose,

and the Supreme Court said:

Mr. White: Let's get straightened out on the instructions.
Mr. Irwin: The Court considers that as an oral instruction.
The Court: I do, and I am not going to send it to the jury.
Both of you lawyers argued it to the jury. The statute says he
may not testify. Your objection is to the substance, Mr. Irwin
objected because the Court didn't write it out and send it to
the jury.
Mr. Irwin: This new practice of its something I don't know
anything about. I don't know, that is all. I don't know whether
the Practice Act is broad enough to cover that.
The Court: I don't know. I don't think it is really vital
as you gentlemen think so.
Mr. Irwin: It would be under the old practice act, but I
don't know about the new practice act.
The Court: There are the ones I refused, three on the matter
of duplication. You may note an exception on the part of coun-
sel for the defendant for the refusal. Let the reporters copy
them.

Mr. Irwin: So far as the instruction being oral is concerned,
you don't object to that?
Mr. White: No.
Mr. Irwin: You and I agree in that particular instance-
The Court: You object to the substance. Note an objection
on the part of defendant's counsel to the giving of the first
paragraph of the Court's instruction to the jury given orally.
Mr. Irwin: He said he waived it.
Mr. White: I am waiving any objection to giving it orally,
but I am objecting to the substance.
The Court: Leave the oral part out.
Mr. White: I am objecting to the substance of the instruction
and take exception.
The Court: You object to the repetitions. All right, let
the record show that the counsel for the plaintiff objects to
the repetition finding defendant not guilty, which appears
five times, I checked that.
A written motion for a new trial was filed, which contained no specific
In Thiel v. Material Service Corp., 233 Ill. App. 46, this

court said:

"The defendant urges that the court erred in instructing the
jury on the law relating to material and solvent and independent
contractors. The defendant also urges upon the giving of a cer-
tain instruction presented to the court by the plaintiff as
being reversible error. The plaintiff, however, has called to
out attention the fact that objections to the instructions were
not specific, and under Sec. 67 of the Civil Practice Act and
7 of the Rules of Court, it does not appear that the specific
objection to the instruction was made before the jury retired,
and by reason of that failure the defendant is in no position
to urge that the giving of the instruction was erroneous.
People v. Schnitzer, 260 Ill. 43; People v. Deaver, 260 Ill.
33; People v. National Bank of Chicago, 260 Ill. 47.
160; People v. Shell Petroleum Corp., 261 Ill. App. 22."

In People v. Schnitzer, 260 Ill. 43, the same question arose
and the Supreme Court said:

"It is also objected that the court erred in giving instructions to the jury. The record shows that counsel for plaintiff in error were given opportunity to object to proposed instructions and that no objections were offered. In this state of the record, and under section 67 of the Civil Practice Act, made applicable to this case by rule 27 of the rules of this court, objections to instructions given are not open to plaintiff in error here."

See also People v. Reeves, 360 Ill. 55.

We are of the opinion that the colloquy quoted does not show a compliance with the statute. We cannot say that the verdict is contrary to the manifest weight of the evidence. The judgment of the Circuit Court is affirmed.

AFFIRMED

DENIS E. SULLIVAN, PJ, and
HEBEL, J, CONCUR.

"It is also objected that the court erred in giving instructions to the jury. The record shows that counsel for plaintiff in error were given opportunity to object to proposed instructions and that no objections were offered. In this state of the record, and under section 67 of the Civil Practice Act, made applicable to this case by rule 47 of the rules of this court, objections to instructions given are not open to plaintiff in error here.

See also People v. Reeves, 360 Ill. 55.

We are of the opinion that the colloquy noted does not show a compliance with the statute. We cannot say that the verdict is contrary to the manifest weight of the evidence. The judgment of the

Circuit Court is affirmed.

REVEREND

HERBERT J. SCHUCHER,
DANIEL E. SULLIVAN, JR., and

No. 38575

ALBERT R. BRUNKER, substituted as
plaintiff in lieu of WRAP-RITE
CORPORATION, a corporation,

Appellee,

v.

GREENLEE FOUNDRY COMPANY,

Appellant.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY

287 I.A. 615²

MR. JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment against the defendant, Greenlee Foundry Company, entered on July 2nd, 1935, for the sum of \$813.60. The cause was tried before the court and a jury. The jury returned a verdict for the amount of the judgment.

On March 18th, 1927, the Wrap-Rite Corporation entered into a contract with the Sommer & Maca Glass Machinery Corporation for the manufacture of certain bread wrapping machines. Fred W. Hauser testified to the effect that he was the superintendent of the Sommer & Maca Glass Machinery Corporation in the year 1927, and that as such superintendent, he gave written orders to the Greenlee Foundry Company, the defendant here, for the manufacture of certain castings, and that in the year 1927 the Sommer & Maca Glass Machinery Corporation was engaged in the business of manufacturing certain bread wrapping machines for the Wrap-Rite Corporation. The written orders testified to by this witness were not produced in evidence, and the record does not disclose that plaintiff made any effort to procure them. Hauser further testified that the representative of the Greenlee Foundry Company, with whom he dealt, was one S. E. Allen, who was the sales representative of the defendant corporation. His testimony is further to the effect that in the summer of 1926 he delivered certain wooden patterns to the defendant corporation to be used in the manufacture by it of the iron castings, which patterns were to be returned when the castings were

ALBERT B. BROWN, defendant as
plaintiff in favor of REP-
LITE CORPORATION, a corporation.

Plaintiff,

v.

GREENLEE FOUNDRY COMPANY,

Defendant.

287 I.A. 615

MR. JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment against the defendant.

Greenlee Foundry Company, entered on July 2nd, 1925, for the sum of \$13.00. The cause was tried before the court and a jury. The jury

returned a verdict for the amount of the judgment.

On March 18th, 1927, the Rep-Lite Corporation entered into

a contract with the Sommer & Hase Glass Machinery Corporation for the

manufacture of certain bread wrapping machines. Fred W. Hansen testi-

fied to the effect that he was the superintendent of the Sommer & Hase

Glass Machinery Corporation in the year 1927, and that as such superin-

tendant, he gave written orders to the Greenlee Foundry Company, the

defendant here, for the manufacture of certain castings, and that in

the year 1927 the Sommer & Hase Glass Machinery Corporation was en-

gaged in the business of manufacturing certain bread wrapping machines

for the Rep-Lite Corporation. The written orders testified to by this

witness were not produced in evidence, and the record does not dis-

close that plaintiff made any effort to procure them. Hansen further

testified that the representative of the Greenlee Foundry Company, with

whom he dealt, was one E. L. Allan, who was for sales representative

of the defendant corporation. His testimony is further to the effect

that in the summer of 1926 he delivered certain wooden patterns to the

defendant corporation to be used in the manufacture of it of the iron

castings, which patterns were to be returned when the castings were

finished.

The evidence further indicates that from March 23rd, 1927, up to and including May 13th, 1927, various castings were manufactured by the Greenlee Foundry Company and delivered to the Sommer & Maca Glass Machinery Corporation, and that on May 15th, 1927, two days after the last of these castings had been delivered to the Sommer & Maca Glass Machinery Corporation, a fire occurred in the plant of the defendant company, in which these wooden patterns were destroyed. It is not shown that there was any agreement on the part of the defendant to return these patterns to the Sommer & Maca Glass Machinery Corporation at any particular time. The action as originally brought, was by the Wrap-Rite Corporation, and by it, it is sought to charge the defendant company with the value of the wooden patterns so destroyed in this fire.

There were three counts in the original declaration as filed. The first count is in trover, and charges that on May 6th, 1927, the defendant wrongfully converted 72 wooden patterns, the property of plaintiff, to its own use. The second count charges, in substance, that on March 4th, 1927, the Wrap-Rite Corporation entered into a contract with the Sommer & Maca Glass Machinery Corporation for the manufacture of certain bread wrapping machines, by the terms of which the Wrap-Rite Corporation was to furnish the necessary patterns from which these castings were to be made; that the defendant operated a foundry in the city of Chicago, and that the Sommer & Maca Glass Machinery Corporation contracted with the defendant for the manufacture of these castings, and had delivered to the defendant certain wooden patterns belonging to the plaintiff; that on May 6th, 1927, the defendant had completed and delivered all of the castings, as provided, and it then became the duty of the defendant to return the patterns, and that defendant, though often requested so to do, had failed and refused to deliver such pat-

finished.

The evidence further indicates that from March 1937, up to and including May 1937, various castings were manufactured by the Greenlee Foundry Company and delivered to the Sommer & Moore Glass Machinery Corporation, and that on May 1937, two days after the last of these castings had been delivered to the Sommer & Moore Glass Machinery Corporation, a fire occurred in the plant of the defendant company, in which these wooden patterns were destroyed. It is not shown that there was any agreement on the part of the defendant to return these patterns to the Sommer & Moore Glass Machinery Corporation at any particular time. The action as originally brought, was by the plaintiff corporation, and by it, it is sought to charge the defendant company with the value of the wooden patterns so destroyed in this fire.

There were three counts in the original declaration as filed. The first count is in trover, and charges that on May 6th, 1937, the defendant wrongfully converted 172 wooden patterns, the property of plaintiff, to its own use. The second count charges, in substance, that on March 4th, 1937, the plaintiff corporation entered into a contract with the Sommer & Moore Glass Machinery Corporation for the manufacture of certain brass wrapping machines, by the terms of which the plaintiff corporation was to furnish the necessary patterns from which these castings were to be made; that the defendant operated a foundry in the city of Chicago, and that the Sommer & Moore Glass Machinery Corporation was trusted with the defendant for the manufacture of these castings, and had delivered to the defendant certain wooden patterns belonging to the plaintiff; that on May 6th, 1937, the defendant had completed and delivered all of the castings, as provided, and it then became the duty of the defendant to return the patterns, and that defendant, although often requested so to do, had failed and refused to deliver such pat-

terns, to the damage of the plaintiff. The third count is in assumpsit, and the charge in it is substantially the same as that contained in the second count. The defendant filed a plea of not guilty as to the first two, non assumpsit as to the last, and a special plea denying that there was any custom in the foundry trade by which patterns furnished to the foundry, were to be returned at any particular time, and a further special plea in which it was set forth that the patterns in question were destroyed by fire while in the possession of the defendant, without any negligence on the part of the defendant. Subsequently, an amended declaration was filed, which is identical with the original, in which it is set forth that Albert R. Bruncker, the plaintiff here, had acquired all the rights of the Wrap-Rite Corporation in the subject matter of the lawsuit. After hearing the evidence, and before the case was submitted to the jury by leave of court, the third count of the declaration was withdrawn, and after the evidence had all been submitted and over the objection of defendant, the court allowed an amended declaration to be filed, in which the plaintiff charges that on May 6th, 1927, defendant undertook and agreed with the Sommer & Maca Glass Machinery Corporation to return all the patterns referred to upon the completion of castings made from such patterns; that all the castings had been made and delivered on May 13th, 1927, and that on May 8th, 1927, and at various times, the Sommer & Maca Glass Machinery Corporation had demanded that such patterns be returned. Defendant objected to the filing of this amended count on the ground that it would change the issues in the case. There was no rule upon the defendant to plead to this count, and no opportunity given it to plead. The record shows that the last of the castings so manufactured by it were delivered by the defendant to the plaintiff two days before the fire.

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~~stantially~~ the same as that contained ~~in~~
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furnished to the foundry, were to be returned at any particular time,
and a further special plea in which it was set forth that the pattern
in question were destroyed by fire while in the possession of the de-
fendant, without any negligence on the part of the defendant. Sub-
sequently, an amended declaration was filed, which is identical with
the original, in which it is set forth that Albert R. Brunner, the
Plaintiff here, had acquired all the rights of the Wap-Rite Corpora-
tion in the subject matter of the lawsuit. After hearing the evidence
and before the case was submitted to the jury by leave of court, the
third count of the declaration was withdrawn, and after the evidence
had all been submitted and over the objection of defendant, the court
allowed an amended declaration to be filed, in which the Plaintiff
charges that on May 6th, 1927, defendant undertook and agreed with
the Sumner & MacGraw Glass Machinery Corporation to return all the pat-
terns referred to upon the completion of castings made from such
patterns; that all the castings had been made and delivered on May
15th, 1927, and that on May 6th, 1927, and at various times, the
Sumner & MacGraw Glass Machinery Corporation had demanded that such
patterns be returned. Defendant objected to the filing of the am-
ended count on the ground that it would change the issues in the
case. There was no rule upon the defendant to plead in this count,
and no opportunity given it to plead. The record shows that the
last of the castings so manufactured by it were delivered by the
defendant to the Plaintiff two days before the fire.

Plaintiff's contention is that at the time the agreement was made with the defendant for the making of the castings referred to, it was agreed between the parties that defendant would return the patterns which had been deposited with the defendant by the plaintiff with the delivery of each installment of the castings. There is no proof in the record that defendant was negligent in caring for these patterns, and there is no claim made by the plaintiff in his brief that defendant was negligent to any degree in caring for them. On the question as to when the patterns were to be returned, Hauser testified to certain conversations alleged to have been held with Allen, the sales representative of the defendant company. He testified to the effect that he told Allen that when he took these patterns over, and when they finished with the patterns on the first bunch of machines, that he, Allen, was to bring the patterns back, and that Allen said, "O. K." Hauser further testified that he could not remember when the patterns were delivered, and that he could not tell the date of his conversations with Allen. He further testified to the effect that there was some complaint by the Sommer & Maca Glass Machinery Corporation that there was a shortage in some of the castings, and that a representative of the defendant company told the witness, in substance, that when this fact, if it was a fact, was made known to the defendant company, that the shortages, if any, would be checked up, and that after the fact in connection with this matter was cleared up, the patterns would be returned, and that he, the witness, told the representative of the defendant company that that would be all right; that he, the witness, was at the foundry just two days before the fire, and that he there sorted out the patterns which had been delivered to the defendant company to make the castings. From the evidence of this witness, it seems apparent that on the day testified about, which, as stated, was two days before the fire

Plaintiff's contention is that at the time the agreement was made with the defendant for the making of the castings referred to, it was agreed between the parties that defendant would return the patterns which had been deposited with the defendant by the Plaintiff with the delivery of each installment of the castings. There is no proof in the record that defendant was negligent in caring for these patterns, and there is no claim made by the Plaintiff in his brief that defendant was negligent to any degree in caring for them. On the question as to when the patterns were to be returned, Hauser testified to certain conversations alleged to have been held with Allen, the sales representative of the defendant company. He testified to the effect that he told Allen that when he took these patterns over, and when they finished with the patterns on the first bunch of machine that he, Allen, was to bring the patterns back, and that Allen said, "O. K." Hauser further testified that he could not remember when the patterns were delivered, and that he could not tell the date of his conversations with Allen. He further testified to the effect that there was some complaint by the Boston & Essex Glass Manufacturing Corporation that there was a shortage in some of the castings, and that a representative of the defendant company told the witness, in substance, that when this fact, if it was a fact, was made known to the defendant company, that the shortages, if any, would be charged up, and that after the fact in connection with this matter was cleared up, the patterns would be returned, and that he, the witness, told the representative of the defendant company that that would be all right; that he, the witness, was at the factory just two days before the fire, and that he there sorted out the patterns which had been delivered to the defendant company to make the castings. From the evidence of this witness, it seems apparent that on the day testified about, which, as stated, was two days before the fire

occurred, he had gone to the foundry of the defendant company, and had there picked out the patterns which he claimed belonged to the Sommer & Maca Glass Machinery Company and ordered them returned. As stated, plaintiff does not claim that defendant was guilty of any degree of negligence in the care of these patterns. The testimony of this witness Hauser is vague as to whether or not there was any agreement as to the time when these patterns were to be returned. Without such an agreement, there is nothing upon which the action can be predicated, for there was no effort made to show any want of care on the part of defendant which resulted in their destruction.

We find nothing in the record which justified the submission of this case to the jury. Therefore, it is ordered that the judgment be reversed and that defendant have judgment here for costs.

REVERSED AND JUDGMENT HERE FOR COSTS

DENIS E. SULLIVAN, PJ, and
HEBEL, J, CONCUR.

occurred, he had come to the factory of the defendant company, and had there placed out the patterns which he claimed belonged to the company. The Glass Machinery Company and ordered them returned. It is stated that plaintiff does not claim that defendant was guilty of any degree of negligence in the care of these patterns. The testimony of this witness is vague as to whether or not there was any agreement as to the time when these patterns were to be returned. Without such an agreement, there is nothing upon which the action can be predicated, for there was no effort made to show any want of care on the part of defendant which resulted in their destruction.

We find nothing in the record which justified the submission of this case to the jury. Therefore, it is ordered that the judgment be reversed and that defendant have judgment here for costs.

REVERSED AND JUDGMENT HERE FOR COSTS

DEBTS R. WILLIAMS, JR., and
HAROLD J. CONNOR.

No. 38588

OSCAR ALBERTINE,

Appellee,

v.

CHARLES L. OSBORN and HARRY W. OSBORN,
co-partners doing business as
OSBORN BROS.,

Appellants.

APPEAL FROM

MUNICIPAL COURT
OF CHICAGO

287 I.A. 615³

MR. JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

This is an appeal by defendants from a judgment of the Municipal Court of Chicago against them for the sum of \$600.00. The cause was tried by the court without a jury, and the judgment is based on the finding of the court.

The action is based upon the following contract:

"This Agreement, entered into this 30th day of October, A.D. 1925, by and between Charles L. Osborn and Harry W. Osborn, co-partners doing business under the style and name of Osborn Bros., hereinafter referred to as parties of the first part, and Oscar Albertine, hereinafter referred to as party of the second part, Witnesseth:

That Whereas, the parties of the first part have heretofore, to-wit: two and one half years ago, employed party of the second part to experiment with and to attempt to produce a new and novel type of hat stretcher; and

Whereas, the party of the second part has produced and on this date exhibited to the parties of the first part a working model metal hat stretcher which upon dilation ~~xx~~ expands laterally as well as longitudinally in a proper ratio; and

Whereas, the party of the second part has at all times understood and agreed that all ideas, plans, models and contrivances pertaining to hat stretchers which might be produced by him, as well as any patent rights on or resulting therefrom, shall be the property of the parties of the first part; and

Whereas, the said party of the second part has agreed to do all acts and to execute and deliver such instruments as may be necessary to obtain and preserve such rights to the parties of the first part; and

Whereas, the party of the second part agrees that the parties of the first part have heretofore paid him in full, to date, for all work, labor and materials furnished by him in carrying on the aforesaid enterprise; and

Whereas, the party of the second part is about to supply himself with certain patterns, dies, gates, etc., necessary to manufacture the aforesaid stretchers; and

Whereas, it is the intention of the parties hereto that the last mentioned patterns, dies, gates, etc., shall immediately be-

Defendant

v.

CHARLES L. OSBORN and HENRY W. OSBORN,
co-defendants doing business as
OSBORN BROS.,

Appellants.

287 I.A. 613

IN THE CIRCUIT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF ILLINOIS

This is an appeal by defendant from a judgment of the Municipal Court of Chicago against them for the sum of \$800.00. The case was tried by the court without a jury, and the judgment is based on the finding of the court.

The action is based upon the following contract:

"This Agreement, entered into this 30th day of October, A.D. 1935, by and between Charles L. Osborn and Henry W. Osborn, co-partners doing business under the style and name of Osborn Bros., hereinafter referred to as parties of the first part, and George Albertine, hereinafter referred to as party of the second part, witnesses:

That whereas, the parties of the first part have heretofore, to-wit: two and one half years ago, employed party of the second part to experiment with and to attempt to produce a new and novel type of hat stretcher; and whereas, the party of the second part has produced and on this date exhibited to the parties of the first part a working model metal hat stretcher which upon dilution was expanded laterally as well as longitudinally in a proper ratio; and whereas, the party of the second part has at all times understood and agreed that all ideas, plans, models and contrivances pertaining to hat stretchers which might be produced by him, as well as any patent rights on or resulting therefrom, shall be the property of the parties of the first part; and whereas, the said party of the second part has agreed to do all acts and to execute and deliver such instruments as may be necessary to obtain and preserve such rights to the parties of the first part; and whereas, the party of the second part agrees that the parties of the first part have heretofore paid him in full, to date, for all work, labor and materials furnished by him in carrying on the former said enterprise; and whereas, the party of the second part is about to supply himself with certain patterns, dies, gages, etc., necessary to manufacture the aforesaid stretchers; and whereas, it is the intention of the parties hereto that the last mentioned patterns, dies, gages, etc., shall immediately be-

come the property of the parties of the first part, and

Whereas, the parties of the first part desire to employ the party of the second part to manufacture a number of the aforesaid hat stretchers:

Now, Therefore, it is agreed by and between the parties hereto as follows:

Party of the second part agrees to manufacture and sell to parties of the first part, and parties of the first part agree to buy, two hundred (200) hat stretching devices similar to the sample on this date exhibited, said stretchers to be in a finished, workmanlike, merchantable article satisfactory to the parties of the first part; the price for the same to be the sum of Three and 75/100 dollars (\$3.75) each. It is agreed that the parties of the first part will pay in full for the stretchers on or before the tenth (10th) day of the month following the day of delivery.

Party of the second part agrees to sell and convey to the parties of the first part all the patterns, dies, gates, etc., to be used in this enterprise, and it is agreed that title to such patterns, dies, gates, etc., shall be at all times hereafter in the parties of the first part, and that the second party will not use same for any purpose other than to carry out this enterprise. It is agreed that parties of the first part shall pay the party of the second part Nine Hundred Fifty Dollars (\$950.00) for said patterns, dies, gates, etc., as follows:

(a) Three Hundred Fifty Dollars (\$350.00) cash, receipt of which is hereby acknowledged, on the execution of this agreement;

(b) Three Hundred Fifty Dollars (\$350.00) at the time of placing any additional order for the aforesaid stretchers;

(c) The balance of Two Hundred Fifty Dollars (\$250.00) at the time of placing any second additional order for said stretchers. It is agreed that the election of the placing of any or all of such orders shall be in the sole direction of the parties of the first part.

It is agreed that the parties of the first part may at any time hereafter pay the unpaid balance of the said nine hundred fifty dollars (\$950.00) and immediately be entitled to possession of said patterns, dies, gates, etc.

Party of the second part agrees to fully insure and to keep insured at all times all said equipment in his possession, at his own expense, against fire, tornado and theft.

Party of the second part agrees to safely keep said patterns, dies, gates, etc., and to deliver the same to parties of the first part upon demand as soon as fully paid for. Party of the second part agrees to furnish parties of the first part at any time, upon demand, a correct itemized list of all such patterns, dies, gates, etc.

In Witness Whereof, the parties hereto have hereunto set their hands and seals the day and year first above written.

Harry W. Osborn	(Seal)
Charles L. Osborn	(Seal)
Oscar Albertine	(Seal)"

In his statement of claim, plaintiff alleges that 200 stretchers, as described in the contract, were manufactured, delivered and paid for by the defendants, and that plaintiff received \$350.00 as a

come the property of the parties of the first part, and
 whereas, the parties of the first part desire to employ the
 party of the second part to manufacture a number of the foregoing
 hat stretchers:
 Now, Therefore, it is agreed by and between the parties here-
 to as follows:

Party of the second part agrees to manufacture and sell to
 parties of the first part, and parties of the first part agree
 to buy, two hundred (200) hat stretching devices similar to the
 sample on this date exhibited, said stretchers to be in a finished,
 workmanlike, merchandise article satisfactory to the parties of
 the first part; the price for the same to be the sum of Three and
 75/100 dollars (\$3.75) each. It is agreed that the parties of the
 first part will pay in full for the stretchers on or before the
 tenth (10th) day of the month following the day of delivery.

Party of the second part agrees to sell and convey to the
 parties of the first part all the patterns, dies, gates, etc., to
 be used in this enterprise, and it is agreed that title to said
 patterns, dies, gates, etc., shall be at all times hereafter in the
 parties of the first part, and that the second party will not use
 same for any purpose other than to carry out this enterprise. It
 is agreed that parties of the first part shall pay the party of
 the second part Nine Hundred Fifty Dollars (\$950.00) for said pat-
 terns, dies, gates, etc., as follows:

(a) Three Hundred Fifty Dollars (\$350.00) cash, receipt of
 which is hereby acknowledged, on the execution of this agreement;
 (b) Three Hundred Fifty Dollars (\$350.00) at the time of
 placing any additional order for the foregoing stretchers;
 (c) The balance of Two Hundred Fifty Dollars (\$250.00) at the
 time of placing any second additional order for said stretchers.
 It is agreed that the location of the placing of any or all of
 such orders shall be in the sole discretion of the parties of the
 first part.

It is agreed that the parties of the first part may at any
 time hereafter pay the unpaid balance of the said nine hundred
 fifty dollars (\$950.00) and immediately be entitled to possession
 of said patterns, dies, gates, etc.

Party of the second part agrees to fully insure and to keep
 insured at all times all said equipment in his possession, at his
 own expense, against fire, tornado and theft.

Party of the second part agrees to fully keep said patterns,
 dies, gates, etc., and to deliver the same to parties of the first
 part upon demand as soon as fully paid for. Party of the second
 part agrees to furnish parties of the first part at any time, upon
 demand, a correct itemized list of all such patterns, dies, gates,
 etc.

In Witness Whereof, the parties hereto have hereunto set their
 hands and seals the day and year first above written.

Harry W. Osborn
 Charles L. Osborn
 (each)
 (each)
 (each)

In the statement of claim, plaintiff alleges that \$500.00 was

there, as described in the contract, were manufactured, delivered and
 paid for by the defendant, and that plaintiff received \$500.00 as a

payment for the cost of the dies; that no further orders for stretchers were placed, and that the defendants are indebted to him in the sum of \$600.00. Defendants made a motion to strike the statement of claim, which motion was denied. Thereupon, they filed an affidavit of merits in which they denied owing any money to the plaintiff, and alleged that further orders to be given plaintiff by them was a condition precedent to the payment of any further sums, and that no further orders were ever given beyond the orders referred to, because the goods delivered under the first order were defective, unsatisfactory and were not in accordance with the contract by plaintiff.

Plaintiff's contention is that although the contract provides that the stretchers to be manufactured were to be a finished, workman-like merchantable article, satisfactory to the defendants, and that defendants were under no obligation to accept any further stretchers than those delivered unless they were satisfactory to the defendants, yet nevertheless, the contract is divisible, and that defendants are liable to plaintiff for certain patterns, dies, gates, etc., which are referred to in his brief as dies, because under the terms of the contract, the title to these vested in the defendants. As we read this contract, the article proposed to be manufactured by the plaintiff for the defendant was experimental in its nature, and the defendants by the very terms of the contract, reserved the right to determine whether the proposed article was satisfactory to them or not. It was their right to do this, and plaintiff signed the contract with this provision in it. The dies referred to were only to be used in manufacturing the article which plaintiff proposed to sell to the defendants under the terms of the contract.

In Green v. Ashland Sixty Third State Bank, 346 Ill. 174, the Supreme Court said:

payment for the cost of the dies; that no further orders for articles were placed, and that the defendants are indebted to him in the sum of \$500.00. Defendants made a motion to strike the statement of claim, which motion was denied. Thereupon, they filed an affidavit of assets in which they denied owing any money to the plaintiff, and alleged that further orders to be given plaintiff by them was a condition precedent to the payment of any further sums, and that no further orders were ever given beyond the orders referred to, because the goods delivered under the first order were defective, unsatisfactory and were not in accordance with the contract by plaintiff.

Plaintiff's contention is that although the contract provided that the articles to be manufactured were to be a finished, workmanlike merchantable article, satisfactory to the defendants, and that the defendants were under no obligation to accept any further articles if those delivered unless they were satisfactory to the defendants, yet nevertheless, the contract is divisible, and that defendants are liable to plaintiff for certain patterns, dies, gages, etc., which are referred to in his brief as dies, because under the terms of the contract, the title to these vested in the defendants. As we read the contract, the article proposed to be manufactured by the plaintiff for the defendant was experimental in its nature, and the defendants by the very terms of the contract, reserved the right to determine whether the proposed article was satisfactory to them or not. It was their right to do this, and plaintiff agreed the contract with this provision in it. The dies referred to were only to be used in manufacturing the article which plaintiff proposed to sell to the defendants under the terms of the contract.

In Grant v. Williams and Third Party, 224 Ill. 146.

the Supreme Court said:

"If the words of a contract are plain and unambiguous the contract must be so construed as to give effect to the plain and obvious import of the language used. (Bearss v. Ford, 108 Ill.16.) When the parties are competent to contract, with the wisdom or folly of their contracts, made for a consideration and without fraud, courts of law have no concern. (Florida Ass'n. v. Stevens, 61 Fla. 508; Mizell Live Stock Co. v. McCaskill Co., 59 id. 322.)"

We are of the opinion that the trial court was in error in finding for the plaintiff and in entering the judgment upon its finding. The judgment is, therefore, reversed and the order of this court is that judgment be entered here in favor of the defendants for costs.

REVERSED AND JUDGMENT ENTERED HERE FOR DEFENDANTS FOR COSTS

DENIS E. SULLIVAN, PJ, and
HEBEL, J, CONCUR.

"If the words of a contract are plain and unambiguous, the court must be so construed as to give effect to the plain and obvious import of the language used. (Wells v. Ford, 100 Ill. 111.) When the parties are competent to contract, with the wisdom or folly of their contracts, made for a consideration and without fraud, courts of law have no concern. (Florida ss'n. v. St. Johns, 81 Fla. 205; Miami Live Stock Co. v. Lee & Hill Co., 50 Fla. 322.)"

We are of the opinion that the trial court was in error in finding for the plaintiff and in entering the judgment upon the findings. The judgment is, therefore, reversed and the order of this court is that judgment be entered here in favor of the defendant for costs.

HERBERT J. CONRAD,
DANIEL S. WILLIAMS, JR., and

38594

LEO AWOTIN,

Appellee,

v.

MICHAEL GABRYEL, et al.,

Defendants.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

On Appeal of
ADOLF DZIALOWY and MARY DZIALOWY,
Co-defendants and Appellants.

287 I.A. 616¹

MR. JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

This is an appeal from a decree of foreclosure entered on June 14th, 1935, in a suit by plaintiff against defendants. The facts in the case, as found by the Master to whom the cause was referred, are substantially as follows:

On October 1st, 1928, Michael Gabryel and Mary Gabryel, his wife, executed a trust deed to secure the payment of a principal note of \$5,000.00, due 5 years after date, and 10 interest notes dated October 1st, 1928, for the sum of \$150.00 each, due serially on the 1st of October and April of each year after the making of the principal note. Prior to September 30th, 1933, the Gabryels conveyed the property to the defendants. He further found that interest notes numbered one to four, both inclusive, evidencing semi-annual interest from October 1, 1928, to October 1, 1930, were paid and cancelled; that Leo Awotin was the owner of said principal note, and purchased the same together with interest notes Nos. 5 to 10 inclusive on February 5th, 1931; that interest coupon notes Nos. 5 to 8 inclusive, were duly paid, cancelled and surrendered, evidencing the interest due and paid October 1st, 1932; that default was made in the payment of interest coupon note No. 9 in the sum of \$150.00, evidencing semi-annual interest due April 1st, 1933, on said principal note; that default was made in the payment of interest

38534

THE STATE

Appellee,

v.

MICHAEL GABRYEL, et al.,

Defendants.

On Appeal of
MICHAEL GABRYEL and MARY DELANOW,
Co-defendants and Appellants.

CIRCUIT COURT

COOK COUNTY.

287 I.A. 616

MR. JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

This is an appeal from a decree of foreclosure entered

on June 14th, 1935, in a suit by plaintiff against defendants. The

facts in the case, as found by the Master to whom the cause was

referred, are substantially as follows:

On October 1st, 1928, Michael Gabryel and Mary Delanow,

his wife, executed a trust deed to secure the payment of a principal

note of \$5,000.00, due 5 years after date, and 10 interest notes

dated October 1st, 1928, for the sum of \$50.00 each, due yearly

on the 1st of October and April of each year after the making of

the principal note. Prior to September 30th, 1934, the Gabryels

conveyed the property to the defendants. He further found that

interest notes numbered one to four, both inclusive, evidencing

semi-annual interest from October 1, 1928, to October 1, 1930,

were paid and cancelled; that Lee Awotin was the owner of said

principal note, and purchased the same together with interest notes

Nos. 5 to 10 inclusive on February 17th, 1931; that interest coupon

notes Nos. 5 to 8 inclusive, were duly paid, cancelled and returned

evidencing the interest due and paid October 1st, 1931; that default

was made in the payment of interest coupon note No. 9 in the sum of

\$150.00, evidencing semi-annual interest due April 1st, 1933, on

said principal note; that default was made in the payment of interest

coupon note No. 10 in the sum of \$150.00, evidencing semi-annual interest due October 1st, 1933, on said principal note; that the principal note in the sum of \$5,000.00 matured on October 1st, 1933, and that an extension agreement as of September 30th, 1933, was executed by Adolf Dzialowy and Mary Dzialowy, his wife, the then record owners of said premises, wherein and whereby the payment of the principal note in the sum of \$5,000.00 was extended for a period of three years from October 1st, 1933, that is to say, until October 1st, 1936, with interest thereon from October 1st, 1933, at the rate of 5% per annum, payable semi-annually at the place in said note mentioned, as evidenced by six extension coupon notes dated September 30th, 1933, each in the sum of \$125.00, that it was agreed in and by said extension agreement that in case of default in the payment of any one of said interest payments, and in case of a failure to keep and perform any one of the covenants and agreements in said note and Trust Deed, that such agreement should at once become null and void; that subsequent to the execution of the extension agreement, Leo Awotin, Adolf Dzialowy and Mary Dzialowy entered into an additional agreement on September 30th, 1933, wherein it was provided that Leo Awotin would pay the taxes on the property for the year 1931, in the sum of \$178.24, and that Adolf Dzialowy and Mary Dzialowy promised and agreed to pay said Leo Awotin said money back in monthly installments of \$30.00. This agreement is as follows:

"In consideration of that Leo Awotin will pay real estate taxes for Dzialowy on property at 4745 S. Kedvale Ave. for the year 1931 in the amount of \$178.24 plus penalties, Adolf Dzialowy and Mary Dzialowy, his wife, promise and agree to pay Leo Awotin said money back in monthly installments of \$30.00, payable on first day of each month, beginning Oct. 1st, 1933.

"It is further promised and agreed that said

coupon note No. 10 in the sum of \$150.00, evidencing semi-annual interest due October 1st, 1933, on said principal note; that the principal note in the sum of \$5,000.00 matured on October 1st, 1933, and that an extension agreement as of September 30th, 1933, was executed by Adolf Daislowy and Mary Daislowy, his wife, the then record owners of said premises, wherein and whereby the payment of the principal note in the sum of \$5,000.00 was extended for a period of three years from October 1st, 1933, that is to say, until October 1st, 1936, with interest thereon from October 1st, 1933, at the rate of 8 per annum, payable semi-annually at the place in said note mentioned, as evidenced by six extension coupon notes dated September 30th, 1933, each in the sum of \$75.00, that it was agreed in and by said extension agreement that in case of default in the payment of any one of said interest payments, and in case of a failure to keep and perform any one of the covenants and agreements in said note and Trust Deed, that such agreement should at once become null and void; that subsequent to the execution of the extension agreement, Leo Awotin, Adolf Daislowy and Mary Daislowy entered into an additional agreement on September 30th, 1933, wherein it was provided that Leo Awotin would pay the taxes on the property for the year 1931, in the sum of \$17.24, and that Adolf Daislowy and Mary Daislowy promised and agreed to pay said Leo Awotin said money back in monthly installments of \$30.00. This agreement is as follows:

"In consideration of the fact that Leo Awotin will pay real estate taxes for Daislowy on property at 4745 E. Federal Ave. for the year 1931 in the amount of \$17.24, and that Daislowy, Adolf Daislowy and Mary Daislowy, his wife, promise and agree to pay Leo Awotin said money back in monthly installments of \$30.00, payable on first day of each month, beginning Oct. 1st, 1933, it is further promised and agreed that said

Dzialowies are allowed to pay the interest coupon due April 1st, 1934, by monthly installments of \$30.00 and the rest seven (7) interest coupons in monthly installments of \$35.00, payable on the first day of each and every month. No action will be taken before the expiration of 30 days."

The Master further found that neither the defendants nor anyone in their behalf, had paid the general taxes for the year 1931 levied against said premises when the same became due and payable; that the plaintiff herein under the provisions of the Trust Deed herein sought to be foreclosed, and to protect the lien thereof, was compelled to and did pay the first installment of 1931 general taxes amounting to \$95.62, and the second installment of 1931 general taxes amounting to \$89.12 on October 30th, 1933; that the sums so expended by the plaintiff herein for said 1931 general taxes are under the terms of the Trust Deed herein sought to be foreclosed, so much additional indebtedness thereunder, together with interest thereon from the date of payment thereof at the rate of 7% per annum; that the said defendants, Adolf Dzialowy and Mary Dzialowy, his wife, on October 3rd, 1933, on November 4th, 1933, on December 2nd, 1933, on January 3rd, 1934, on February 3rd, 1934, and on March 5th, 1934, made payments of \$30.00 each, aggregating a total of \$180.00 to the plaintiff herein on account of the expenditure by him in payment of said 1931 taxes; that on April 1st, 1934, extension coupon note No. 1 evidencing semi-annual interest on said principal note as extended, became due and payable; that on said date there was due and unpaid the sum of \$4.74 on account of the expenditure made by the plaintiff for said 1931 taxes, together with interest at the rate of 7% per annum on the unpaid balance due, from time to time, on said advancement; that on April 7th, 1934, said defendants, Adolf Dzialowy and Mary Dzialowy, his wife, paid to the plaintiff the sum of \$30.00 on account of the balance due the plaintiff for payment of said 1931 taxes as aforesaid, and on account

Defendants are allowed to pay the interest coupon due April 1st, 1934, by monthly installments of \$30.00 and the rest seven (7) interest coupons in monthly installments of \$35.00, payable on the first day of each and every month. No action will be taken before the expiration of 30 days."

The Master further found that neither the defendants nor anyone in their behalf, had paid the General taxes for the year 1931 levied against said premises when the same became due and payable; that the plaintiff herein under the provisions of the Trust Deed herein sought to be foreclosed, and to protect the lien thereof, was compelled to and did pay the first installment of 1931 General taxes amounting to \$25.82, and the second installment of 1931 General taxes amounting to \$29.19 on October 30th, 1932; that the sum so expended by the plaintiff herein for said 1931 General taxes are under the terms of the Trust Deed herein sought to be foreclosed, so much additional indebtedness thereunder, together with interest thereon from the date of payment thereof at the rate of 7% per annum; that the said defendants, Adolf Delawolow and Mary Delawolow, his wife, on October 31st, 1932, on November 4th, 1932, and on March 2nd, 1933, on January 2nd, 1934, on February 2nd, 1934, and on March 2nd, 1934, made payments of \$30.00 each, aggregating a total of \$180.00 to the plaintiff herein on account of the expenditures by him in payment of said 1931 taxes; that on April 1st, 1934, extended coupon note No. 1 evidencing semi-annual interest on said mortgage note as extended, became due and payable; that on said date there was due and unpaid the sum of \$4.74 on account of the expenditures made by the plaintiff for said 1931 taxes, together with interest at the rate of 7% per annum on the unpaid balance due, from time to time, on said advancement; that on April 7th, 1934, said defendant, Adolf Delawolow and Mary Delawolow, his wife, paid to the plaintiff the sum of \$50.00 on account of the balance due the plaintiff for payment of said 1931 taxes as aforesaid, and on account

of said extension coupon note No. 1, due April 1st, 1934; that thereafter said defendants made the following payments on account of said extension coupon note No. 1, to-wit: On May 7th, 1934, the sum of \$30.00; on June 1st, 1934, the sum of \$5.00; on June 5th, 1934, the sum of \$25.00; on July 4th, 1934, the sum of \$15.00, and on July 20th, 1934, the sum of \$10.00; that no further payments were made by said defendants on account of said extension coupon note No. 1, due April 1st, 1934, and that default was made in the payment of the balance due thereon of \$14.74; that no payments were made by said defendants on account of interest coupon notes Nos. 9 and 10, due, respectively, on April 1st, 1933, and October 1st, 1933, or on account of any extension coupon note maturing subsequent to April 1st, 1934; that neither said defendants nor anyone in their behalf, had paid the general taxes for the years 1929, 1930 and 1932, levied against the premises, when the same became due and payable, and he found that the premises were forfeited for the nonpayment of the said taxes for the year 1929; that by reason of said defaults and by reason of the default in the payment of interest coupon notes Nos. 9 and 10, due on the first day of April and the first day of October, and by reason of further default in the payment of taxes for the years 1929, 1930 and 1932, the plaintiff, being the legal holder of said notes and Trust Deed, declared the entire amount due; that on September 28th, 1934, the plaintiff, Leo Awotin, paid on account of 1930 and 1929 general taxes the sum of \$237.66; that on said date, plaintiff, under the provisions of said Trust Deed, ^{the} paid/first installment of the 1932 taxes amounting to \$72.06, and on account of second installment of general taxes for said year, paid \$41.16; that there is due plaintiff, together with costs and attorney's fees, a total sum of \$6,343.40.

Defendants' position seems to be as follows: (1) that by

of said extension coupon note No. 1, due April 1st, 1934; that after said defendants made the following payments on account of said extension coupon note No. 1, to-wit: On May 7th, 1934, the sum of \$30.00; on June 1st, 1934, the sum of \$5.00; on June 8th, 1934, the sum of \$5.00; on July 4th, 1934, the sum of \$5.00, and on July 20th, 1934, the sum of \$10.00; that no further payments were made by said defendants on account of said extension coupon note No. 1, due April 1st, 1934, and that default was made in the payment of the balance due thereon of \$14.74; that no payments were made by said defendants on account of interest coupon notes Nos. 2 and 10, due respectively, on April 1st, 1933, and October 1st, 1933, or on account of any extension coupon note maturing subsequent to April 1st, 1934; that neither said defendants nor anyone in their behalf had paid the general taxes for the years 1932, 1933 and 1934, levied against the premises, when the same became due and payable, and he found that the premises were forfeited for the nonpayment of the said taxes for the year 1932; that by reason of said default and by reason of the default in the payment of interest coupon notes Nos. 2 and 10, due on the first day of April and the first day of October, and by reason of further default in the payment of taxes for the years 1932, 1933 and 1934, the plaintiff, being the legal holder of said notes and Trust deed, declared the entire amount due that on September 28th, 1934, the plaintiff, two action, paid on account of 1930 and 1932 general taxes the sum of \$27.50; that on said date, plaintiff, under the provisions of said Trust deed, paid the first installment of the 1934 taxes amounting to \$7.00, and on account of second installment of general taxes for said year, paid \$1.10; that there is due plaintiff, together with costs and attorney's fees, a total sum of \$343.40.

Defendants' position seems to be as follows: (1) that by

entering into the extension agreement of September 30th, 1933, the plaintiff waived all then existing defaults and thereby lost his right to declare an acceleration based thereon; (2) that the payments made by the defendants after the extension agreement, aggregating the sum of \$295.00, should be applied toward the payment of the defaults subsequently occurring, that is to say, the default in the payment of Extension Interest Coupon No. 1, and in the payment of the 1932 taxes.

As to the application of the \$295.00 paid by defendants, the Master found that the sum of \$186.78 was applied by plaintiff toward complete satisfaction of the 1931 taxes paid by him, and the sum of \$108.22 was applied by plaintiff toward the partial payment of extension interest coupon Note No. 1 amounting to \$125.00, which matured on April 1st, 1931, leaving a balance due on this note of \$16.78.

There is no question of fact involved. As stated, defendants insist that the defaults in payment, upon which the mortgage foreclosure is predicated, are for defaults that occurred prior to the execution of the extension agreement, and that, therefore, no right of action existed. The existence of the defaults is not disputed. By the terms of the extension agreement and the rider thereto concerning the taxes and interest, it is shown that defendants agreed to the application of the money paid by them to plaintiff, and that the defaults existed, as alleged in the bill and found by the Master. The action is predicated upon these facts.

We are of the opinion that the court did not err in approving the report of the Master and in entering the decree. Therefore, the decree of the Circuit Court is affirmed.

AFFIRMED.

DENIS. E. SULLIVAN, P.J. AND HEBEL, J. CONCUR.

entered into the extension agreement of September 20th, 1931, the plaintiff waived all then existing defaults and thereby lost his right to declare an acceleration based thereon; (2) that the payments made by the defendants after the extension agreement, aggregating the sum of \$235.00, should be applied toward the payment of the defaults subsequently occurring, that is to say, the defaults in the payment of Extension Interest Coupon No. 1, and in the payment of the 1932 taxes.

As to the application of the \$235.00 paid by defendants, the master found that the sum of \$186.78 was applied by plaintiff toward complete satisfaction of the 1931 taxes paid by him, and the sum of \$108.22 was applied by plaintiff toward the partial payment of extension interest coupon note No. 1 amounting to \$115.00, which matured on April 1st, 1931, leaving a balance due on this note of \$16.78.

There is no question of loss involved, as stated, defendants insist that the defaults in payment, from which the mortgage foreclosure is predicated, are the defaults that occurred prior to the execution of the extension agreement, and that, therefore, no right of action existed. The existence of the default is not disputed. By the terms of the extension agreement and the rider thereto concerning the taxes and interest, it is shown that defendants agreed to the application of the money paid by them to plaintiff, and that the defaults existed, as alleged in the bill and found by the master. The action is predicated upon these facts.

It is the opinion of the court that the court did not err in accepting the report of the master and in entering the decree. Therefore, the decree of the Circuit Court is affirmed.

DECEMBER 1, 1931.

WILLIAM E. HAMILTON, J. J. AND OTHERS, PLAINTIFFS.

38591

AGNES GIESLER,
(Plaintiff) Appellee,

v.

CHICAGO, BURLINGTON & QUINCY RAIL-
ROAD COMPANY,
(Defendant) Appellant.

201
APPEAL FROM
SUPERIOR COURT
COOK COUNTY.

287 I.A. 616²

MR. JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendant from a judgment entered by the court in a personal injury suit brought by the plaintiff for injuries sustained while a passenger of the defendant Railroad Company in December, 1932. The verdict of the jury was for \$15,000, which was reduced by the remittance of the sum of \$5,000 by the plaintiff at the suggestion of the trial court, and therefore the judgment is now for the sum of \$10,000.

The declaration upon which this action is based consists of three counts, all of which allege negligence. To the declaration the defendant filed a plea of the general issue, and also a plea of non-operation. A trial was had, and no point was raised on the pleadings.

The facts in this action are that on the morning of December 19, 1932, while a steam suburban train of the defendant was coasting about four miles per hour through fog upon track 4 of the Union Station, Chicago, the engine struck a bumping post, breaking the cowcatcher of the engine and

287 I.A. 61

APPEAL FROM
SUPERIOR COURT
COOK COUNTY.

CHICAGO, BURLINGTON & QUINCY RAIL-
ROAD COMPANY,
(Defendant) Appellant.
v.
AGNES GIESLER,
(Plaintiff) Appellee.

38581

MR. JUSTICE EARLE DELIVERED THE OPINION OF THE COURT.
This is an appeal by the defendant from a judgment entered by the court in a personal injury suit brought by the plaintiff for injuries sustained while a passenger of the defendant Railroad Company in December, 1932. The verdict of the jury was for \$15,000, which was reduced by the remittance of the sum of \$5,000 by the plaintiff at the suggestion of the trial court, and therefore the judgment is now for the sum of \$10,000.
The declaration upon which this action is based contains three counts, all of which allege negligence. In the declaration the defendant filed a plea of the general issue, and also a plea of non-operation. A trial was had, and no point was raised on the pleadings.
The facts in this action are that on the morning of December 12, 1932, while a steam suburban train of the defendant was coasting about four miles per hour through for some track 4 of the Union Station, Chicago, the engine struck a bumping post, breaking the cowcatcher of the engine and

causing a sudden stop of the train on which plaintiff was riding as a passenger in the first car behind the engine. She was getting up from the seat and had one foot in the aisle and one foot between the seats. A number of people were standing in the aisle of the coach with their bodies about four to six inches apart. When the collision occurred the man in front of the plaintiff caught her with his elbow and she struck the seat in front of her, went over backwards and then sideways, and went down hitting a package carried by the man behind her and sat down on the floor of the aisle. She got up unassisted, got off the train and walked to the depot, up a double flight of stairs to Canal Street, boarded a bus and rode to Madison and Wabash and walked thence to her office in the Pittsfield Building where she worked as a dental assistant. She had a pain in her stomach and in the region of her hips and back. She worked at her desk the rest of the day, was off the following day, returned and continued to work, and does not know when she first lost time thereafter. She made no report of the accident, or of being on the train, to the railroad company.

Five days after the accident for the first time she saw a physician, Dr. Clowes, to whom she complained of her stomach but not her neck. The doctor made a complete examination of her with her clothes removed. There were no bruises, lumps or discolorations on her body, but she complained of pain in epigastrium in front and middle of her abdomen. She was told to and did use a hot water bottle therefor. She again went to Dr. Clowes on January 11th, after which she had a

causing a sudden stop of the train on which plaintiff was riding as a passenger in the first car behind the engine. She was sitting up from the seat and had one foot in the aisle and one foot between the seats. A number of people were standing in the aisle of the coach with their bodies about four to six inches apart. When the collision occurred the man in front of the plaintiff caught her with his elbow and she struck the seat in front of her, went over backwards and then sideways, and went down hitting a passage carried by the man behind her and set down on the floor of the aisle. She got up unassisted, got off the train and walked to the depot, up a double flight of stairs to Canal Street, boarded a bus and rode to Madison and Wabash and walked thence to her office in the Pittsfield Building where she worked as a dental assistant. She had a pain in her stomach and in the region of her hips and back. She worked at her desk the rest of the day, and was off the following day, returned and continued to work, and does not know when she first lost time thereafter. She made no report of the accident, or of being on the train, to the railroad company.

Five days after the accident for the first time she saw a physician, Dr. Clower, to whom she complained of her stomach but not her back. The doctor made a complete examination of her with her clothes removed. There were no bruises, lumps or discolorations on her body, but she complained of pain in epigastrium in front and middle of her abdomen. She was told to and did use a hot water bottle thereon. She again went to Dr. Clower on January 11th, after which she had a

lawyer make a claim against the defendant.

Plaintiff continued to work, and in March, 1933, went to Dr. Ritter, who had X-rays taken, and put her in a cast on account of her complaint of pain in her back where he had operated on her in 1926. She was kept in a body cast until June, 1933, when she started to wear a back brace which she had worn after the operation in 1926. She wore a brace until December, 1933, when she started to wear a special corset, which she now wears during the day.

Plaintiff's pay is and has been \$15.00 per week and she has lost wages for nine weeks at \$15.00 a week since the accident, amounting to \$135.00. She washed dishes and ironed her own clothes; menstruation periods have been very irregular, sometimes occurring in three weeks, sometimes in five weeks, and sometimes in four weeks, there being nothing unusual except difference in time. She has some pain every day and about once every two months has severe pain in her back and in the back of her legs, and is off two or three days from work. Her doctor and medical bills on account of the accident amounted to \$98.50.

- Previous to this accident, plaintiff, who was born in 1903, and who started working when fifteen years of age, worked for the Burlington Railroad for three years, beginning in 1918, and gave up her position on account of chronic appendicitis, for which she had an operation. She then started training as a nurse, but was compelled to discontinue on account of pain in her back. She was operated on at St. Luke's Hospital in 1922 for an osteoma of the spine; thereafter she did housework. She was injured in a taxicab accident in 1924, since which time she has had pain in her back just below the place where a growth had been removed. She was unable to work thereafter except doing some of her own house-

lawyer make a claim against the defendant.

Plaintiff continued to work, and in March, 1933, went to Dr. Ritter, who had X-rays taken, and put her in a cast on account of her complaint of pain in her back where he had operated on her in 1928. She was kept in a body cast until June, 1933, when she started to wear a back brace which she had worn after the operation in 1928. She wore a brace until December, 1933, when she started to wear a special corset, which she now wears during the day.

Plaintiff's pay is and has been \$15.00 per week and she has lost wages for nine weeks at \$15.00 a week since the accident, amounting to \$135.00. She washed dishes and ironed her own clothes; menstruation periods have been very irregular, sometimes occurring in three weeks, sometimes in five weeks, and sometimes in four weeks, there being nothing unusual except difference in time. She has sore pain every day and about once every two months has severe pain in her back and in the back of her legs, and is off two or three days from work. Her doctor and medical bills on account of the accident amounted to \$28.50.

Previous to this accident, plaintiff, who was born in 1903, and who started working when fifteen years of age, worked for the Burlington Railroad for three years, beginning in 1918, and gave up her position on account of chronic appendicitis, for which she had an operation. She then started training as a nurse, but was compelled to discontinue on account of pain in her back. She was operated on at St. Luke's Hospital in 1922 for an abscess of the spine; thereafter she did housework. She was injured in a taxi cab accident in 1924, since which time she has had pain in her back just below the place where a growth had been removed. She was unable to work thereafter except doing some of her own house-

work. A cast was placed on her back and she then wore a heavy brace until 1926, when, in walking, she missed a step, sat down, and thereafter had trouble with her legs and a great deal of pain in her back. She was again operated on in April, 1926, and another osteoma removed from where it had recurred since a former operation. She was also operated on for fusion of lumbo-sacral and sacro-iliac joints of lower back to relieve pain. Dr. Ritter removed strips of bone from spinous processes and ilium and laid them across the joints. She was in the hospital about three months and thereafter wore a cast for several months, and a steel and leather brace for three years or more, and ordinary corset thereafter. In 1928 she was in a hospital on account of nervousness and pains in the lower back and while under observation as to whether she needed further surgery for spinal fusion, after ten days she developed streptococci sore throat which kept her in a hospital seven weeks. She had colitis for several years after 1928, and has had headaches since strepto infection in her throat in 1928. She was in out-patient department of hospital in December, 1929, to have the back brace adjusted. In March, 1932 she had pain in epigastrium, bloating of abdomen and rumbling and gurgling noises associated with gastric trouble, having suffered on and off for a year or more. In April, 1932, she was treated by Doctor Clowes for headaches and backache. In September, 1932, she was in out-patient department of hospital on account of again having some pain since the operation, especially when tired and nervous. In October, 1932, two months previous to this accident she was struck on the back of her neck by a baseball and had constant pains and headache.

After the accident in May, 1933, she was seen twice

work. A cast was placed on her back and she then wore a heavy brace until 1933, when, in walking, she missed a step, sat down, and thereafter had trouble with her legs and a great deal of pain in her back. She was again operated on in April, 1933, and another osteoma removed from where it had occurred since a former operation. She was also operated on for fusion of lumbo-sacral and sacro-iliac joints of lower back to relieve pain. Dr. Ritt removed strips of bone from spinous processes and ilium and laid them across the joints. She was in the hospital about three months and thereafter wore a cast for several months, and a steel and leather brace for three years or more, and ordinary corset thereafter. In 1933 she was in a hospital on account of nervousness and pains in the lower back and while under observation as to whether she needed further surgery for spinal fusion, after ten days she developed streptococcal sore throat which kept her in a hospital seven weeks. She had colitis for several years after 1933, and has had headaches since streptococcal infection in her throat in 1933. She was in out-patient department of hospital in December, 1933, to have the back brace adjusted. In March, 1933 she had pain in epigastrium, bloating of abdomen, and rumbling and gurgling noises associated with gastric trouble, having suffered on and off for a year or more. In April, 1933, she was treated by Doctor Glower for headaches and prostrache. In September, 1933, she was in out-patient department of hospital on account of again having some pain since the operation, especially when tired and nervous. In October, 1933, two months previous to this accident she was struck on the back of her neck by a baseball and had constant pains and headaches. After the accident in May, 1933, she was seen twice

by Doctor Clowes for complaint of lung trouble, and in April 1934, she had swelling of her left ankle and leg up to her knee, which disappeared in four days, with history of having had influenza six weeks previous to leg swelling. In November, 1934, she was treated for diarrhea for three days. In December, 1934, she had a cold in her head and chest for a week. In April, 1935, she went to the doctor on account of a cough.

In April, 1935, she was X-rayed by medical experts at the direction of her attorney. One lateral X-ray view was taken with her body bent forward and another view with her body bent backwards. Comparison of plates showed a narrower space in front between the vertebrae when she bent forward as compared with the view when she bent backwards. The doctors testified this was proper for a normal person, but because she had been operated on in 1926, to fuse the joints so they would not move, it was concluded and argued that she had a fracture of her back in this accident which occurred more than two years before the X-rays were taken.

From the defendant's brief, no contention is made on the part of the defendant that it was not negligent or responsible for the actual damages from injuries, if any, sustained by the plaintiff. The whole controversy seems to hinge on the question of the nature of the injuries sustained by the plaintiff.

The plaintiff's position is that as a result of defendant's negligence she sustained a fracture or a breaking of a previously existing fusion of the vertebrae; that pain and suffering, which exists constantly, has resulted from such fracture or break; that the plaintiff has been forced to wear a brace during the entire day from the time of the acci-

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The plaintiff's position is that as a result of defendant's negligence she sustained a fracture or a breaking of a previously existing fusion of the vertebrae; that pain and suffering, which exists constantly, has resulted from such fracture or break; that the plaintiff has been forced to wear a brace during the entire day from the time of the accident.

dent to the present time; that because of the accident plaintiff has suffered irregular menstruation; severe pains in her leg, rigidity of her back muscles in several places, inability to sleep at certain times, and various pain and suffering from all of these physical ailments; and that the plaintiff has sustained financial loss due to being incapacitated from doing her work as well as she did before the accident.

One of the grounds urged by the defendant for a reversal of the judgment is that where the verdict is manifestly against the weight of the evidence courts have reversed cases even though a remittitur has been entered by the trial court. Where damages are so excessive that they can be accounted for only on the ground of passion, prejudice or misconception of the evidence, a remittitur will not cure the verdict. In support of this position defendant points to the fact that the accident occurred in December, 1932; that trial was had in June, 1935, and that plaintiff's total medical, hospital, and surgical expense claimed on account of injury was \$98.50. She states that after the accident she lost wages from her work for nine weeks, at \$15.00 per week, amounting to \$135.00, but her family physician stated that during the past two and one half years she has been treated for lung trouble, swelling of the ankle, influenza, diarrhea, and head and chest colds. The total financial loss claimed by her is \$230.50. This amount the defendant alleges was the actual loss sustained by the plaintiff, and we gather from defendant's statement that the expense was incurred up to the time of the trial.

The question of damages, if any, sustained by the plaintiff by reason of physical injury, is the important one in this case. Liability for damages incurred has been admitted

dent to the present time; that because of the accident plaintiff has suffered irregular menstruation; severe pain in her leg, rigidity of her back muscles in several places, inability to sleep at certain times, and various pain and suffering from all of these physical ailments; and that the plaintiff has sustained financial loss due to being incapacitated from doing her work as well as she did before the accident.

One of the grounds urged by the defendant for a reversal of the judgment is that where the verdict is manifestly against the weight of the evidence courts have reversed cases even though a remittitur has been entered by the trial court. There damages are so excessive that they can be accounted for only on the ground of passion, prejudice or misconception of the evidence, a remittitur will not cure the verdict. In support of this position defendant points to the fact that the accident occurred in December, 1932; that trial was had in June, 1932, and that plaintiff's total medical, hospital, and surgical expenses claimed on account of injury was \$28.50. She stated that after the accident she lost wages from her work for nine weeks, at \$15.00 per week, amounting to \$135.00, but her family physician stated that during the past two and one half years she has been treated for lung trouble, swelling of the ankle, influenza, diarrhea, and head and chest colds. The total financial loss claimed by her is \$230.50. This amount the defendant alleges was the actual loss sustained by the plaintiff, and we gather from defendant's statement that the expense was incurred up to the time of the trial. The question of damages, if any, sustained by the plaintiff by reason of physical injury, is the important one in this case, liability for damages incurred has been admitted

by the defendant, and its main contention is that there was no evidence of any union or fusion of her lumbo-sacral and sacro-iliac joints as the result of an operation in 1926, and that the claim for damages was based upon a claimed fracture of the fusion of these joints.

From the record it clearly appears that there was an operation upon the lumbo-sacral and sacro-iliac joints and that the plaintiff suffered pain prior to the operation, and that she lost the use of her legs; that as a result of this operation an improved condition prevailed so that the plaintiff was able to walk; that from 1926 to 1929 - approximately three years - she wore a brace to support her back; that after that period, in 1929, she was able to return to work without any brace, and there is evidence in the record that she made no complaint of any pain during the period between 1929 and 1932. It also appears from the record that she had been working and that her health appeared to be good, and from the medical testimony in the record it appears that there was a gradual cessation of pain from the day of the operation until the time of the accident, when it is contended that this fusion was fractured and she again suffered pain; that, according to the medical testimony, the absence of pain would indicate that the operation which had been performed for the purpose stated in this opinion was successful. The physician who performed the operation testified that an X-ray would not show whether there was a fusion, and he explained this by stating that in this type of injury the joint itself is not disturbed.

by the defendant, and the main contention is that there was no evidence of any union or fusion of her lumbo-sacral and sacro-iliac joints as the result of an operation in 1928, and that the claim for damages was based upon a claimed fracture of the fusion of these joints.

From the record it clearly appears that there was an operation upon the lumbo-sacral and sacro-iliac joints, and that the plaintiff suffered pain prior to the operation, and that she lost the use of her legs; that as a result of this operation an improved condition prevailed so that the plaintiff was able to walk; that from 1928 to 1929 - approximately three years - she wore a brace to support her back; that after that period, in 1929, she was able to return to work without any brace, and there is evidence in the record that she made no complaint of any pain during the period between 1929 and 1932. It also appears from the record that she had been working and that her health appeared to be good, and from the medical testimony in the record it appears that there was a gradual cessation of pain from the day of the operation until the time of the accident, when it is contended that the fusion was fractured and she again suffered pain; that, according to the medical testimony, the chance of pain would indicate that the operation which had been performed for the purpose stated in this opinion was successful. The physician who performed the operation testified that an X-ray would not show whether there was a fusion, and he explained this by stating that in this type of injury the joint itself is not disturbed.

There was some testimony as to whether or not an X-ray would show whether a fusion had taken place after an operation of this character had been performed. The subject was thoroughly considered, but after all the question was one of fact for the jury, and it was necessary for the jury to determine whether or not the fusion had taken place, and in so determining weigh the evidence offered by the litigants, of which, in our opinion, there was sufficient to submit the question to the jury; in fact, this was the only question to be decided. The fact that the plaintiff had an operation prior to the accident raises the question whether the fusion of the vertebrae alleged to have taken place after the operation was disturbed by this accident. If the evidence establishes that it was, the plaintiff is entitled to damages.

The amount which the jury found to compensate the plaintiff for damages was \$15,000. The trial judge in his wisdom reached the conclusion, no doubt, that this amount was excessive and suggested to the plaintiff if she would enter a remittitur of \$5,000, the court would enter a judgment for \$10,000, which was done. From this exercise of its discretion we are unable to find that the court believed the verdict was due to passion or prejudice of the jury.

A number of authorities are cited by both sides upon the question of the Court's exercise of its discretion. The law is well settled upon this question.

Whether or not the exercise is a proper one must depend in each case upon the facts and circumstances before the jury at the time of the finding of its verdict. It is not necessary for us to point out the differences in each of

There was some testimony as to whether or not an X-ray would show whether a fusion had taken place after an operation of this character had been performed. The subject was thoroughly considered, but after all the question was one of fact for the jury, and it was necessary for the jury to determine whether or not the fusion had taken place, and in so determining weigh the evidence offered by the witnesses, of which, in our opinion, there was sufficient to submit the question to the jury; in fact, this was the only question to be decided. The fact that the plaintiff had an operation prior to the accident raises the question whether the fusion of the vertebrae alleged to have taken place after the operation was disturbed by this accident. If the evidence established that it was, the plaintiff is entitled to damages.

The amount which the jury found to compensate the plaintiff for damages was \$12,000. The trial judge in his decision reached the conclusion, no doubt, that this amount was excessive and suggested to the plaintiff if he would enter a remittitur of \$2,000, the court would enter a judgment for \$10,000, which was done. From this exercise of its discretion we are unable to find that the court believed the verdict was due to passion or prejudice of the jury.

A number of authorities are cited by both sides upon the question of the Court's exercise of its discretion. The law is well settled upon this question.

Whether or not the exercise is a proper one must depend in each case upon the facts and circumstances before the jury at the time of the finding of its verdict. It is not necessary for us to point out the differences in each of

the authorities cited upon this question, for they all conclude that what would be exercise of proper discretion by the court in each case must depend upon the facts and circumstances in evidence.

Defendant raises the point that counsel for plaintiff was guilty of misconduct in this case upon the ground that he repeated improper questions to which objections were sustained, thereby creating undue prejudice against the defendant, and points in its brief to the part of the record from which it appears that questions put to an expert witness had been objected to and the objections sustained by the court. The case hinged largely upon the question of medical evidence regarding the surgical operation. Plaintiff answers this contention by stating that no specific grounds were given for the objections made by the defendant, and plaintiff's counsel suggests that at no time did defendant's counsel think its case was being prejudiced, for the reason that he did not request the court to instruct the jury to disregard the questions at the time the examination took place. We have considered the objections of the defendant to the questions asked by plaintiff's counsel and the ruling of the court thereon. There is no indication in the record that the court did not act promptly. On the contrary, it appears that in most instances the ruling of the court favored the defendant.

Defendant complains of questions put by the plaintiff to the medical expert as to whether or not an operation would help the plaintiff. Such examination is proper when the questions asked are limited to the facts then before the jury and are intended to elicit from a witness his opinion regarding the

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Defendant complains of questions put by the plaintiff
to the medical expert as to whether or not an operation would
help the plaintiff. Such examination is proper when the ques-
tions asked are limited to the facts then before the jury and
are intended to elicit from a witness his opinion regarding the

facts contained in a hypothetical question. Morton & Co. v. Zwierzykowski, 192 Ill. 328.

It is not always prejudicial error for counsel in a case to repeat questions after objections have been made and sustained. In the case of McInerney v. Western Packing Co., 249 Ill. 240, the Supreme Court upon this subject said:

"We see no justification for the question asked by counsel and he should not have asked it, but it was not a flagrant violation of the proprieties and calculated to prejudice plaintiff in error's case to such a degree that we would feel justified in reversing the judgment solely on that account."

As we view the record, we are of the opinion that it was not the purpose of the plaintiff to create prejudice in the minds of the jury against the defendant, nor did she do so.

The defendant contends that in the argument of plaintiff's counsel to the jury reference was made to the presence of Dr. Hall at defendant's counsel table. While it is never proper to refer to the presence of a witness or any incident not properly before the jury, still from an examination of the argument we are of the opinion there was no reversible error on that ground.

When we have in mind the defendant admitted liability for any injury sustained by the plaintiff as a result of this accident, which would unquestionably include the amount of damages to be assessed by the jury, it would seem such reference by counsel could not be criticized on the ground that such conduct tended to prejudice the jury.

After the verdict of the jury had been returned and before the court entered judgment, the defendant as grounds for a new trial filed a motion, supported by affidavits setting up

a new trial filed a motion, supported by affidavits setting up before the court entered judgment, the defendant as grounds for After the verdict of the jury had been returned and conduct tended to prejudice the jury.

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newly discovered evidence and showing if a new trial were granted, defendant would be able to prove that X-rays taken in March, 1933, show no bone fracture or recent bony changes in plaintiff's back which would have been apparent at that time. It would seem from the affidavit offered in support of this motion that the subpoena deuces tecum was served on the officers of St. Luke's Hospital to produce all records of X-rays and reports covering the plaintiff. Certain X-rays were not located until after the trial, and although the plaintiff testified that some were taken in 1933 and Dr. Ritter, one of the witnesses for plaintiff, testified they were available, it does not seem from the statements as they appeared before the jury that the trial court erred in refusing to grant a new trial on the ground of newly discovered evidence. The rule is familiar that in making a motion of this kind diligence is necessary, and as far as we have been able to determine, there is nothing in the record that would indicate the X-rays which were to be used in evidence, and referred to by Dr. Jenkinson, could not have been found or produced for use at the trial, and if the defendant had knowledge of the fact that certain of these plates were in existence it would not be entitled to an allowance of the motion. The facts set up in the affidavit do not indicate diligence, and we are of the opinion the evidence sought to be offered, if introduced, would tend to bring in evidence to contradict the testimony of witnesses already before the jury. We believe the refusal of the court to grant a new trial on this ground was proper.

While the record may be erroneous in some respects,

newly discovered evidence and showing if a new trial were granted, defendant would be able to prove that X-rays taken in March, 1933, show no bone fracture or recent bony changes in plaintiff's back which would have been apparent at that time. It would seem from the affidavit offered in support of this motion that the subpoena duces tecum was served on the officers of St. Luke's Hospital to produce all records of X-rays and reports covering the plaintiff. Certain X-rays were not located until after the trial, and although the plaintiff testified that some were taken in 1933 and Dr. Pitter, one of the witnesses for plaintiff, testified they were available, it does not seem from the statements as they appeared before the jury that the trial court erred in refusing to grant a new trial on the ground of newly discovered evidence. The rule is that in making a motion of this kind diligence is necessary, and as far as we have been able to determine, there is nothing in the record that would indicate the X-rays which were to be used in evidence, and referred to by Dr. Jenkinson, could not have been found or produced for use at the trial, and if the defendant had knowledge of the fact that certain of these plates were in existence it would not be entitled to an allowance of the motion. The facts set up in the affidavit do not indicate diligence, and we are of the opinion the evidence sought to be offered, if introduced, would tend to bring in evidence to contradict the testimony of witnesses already before the jury. We believe the refusal of the court to grant a new trial on this ground was proper.

While the record may be erroneous in some respects,

we are of the opinion there is no error that would justify a reversal of the judgment of the Superior Court, and it is affirmed.

JUDGMENT AFFIRMED.

DENIS E. SULLIVAN, P. J.
AND HALL, J. CONCUR.

we are of the opinion there is no error that would justify a reversal of the judgment of the Superior Court, and it is affirmed.

JUDGMENT AFFIRMED.

DENIS E. SULLIVAN, P. J.
AND NAEL, J. CONCUR.

38726

ELSIE HEIDE,

Appellee,

v.

LINCOLN FURNITURE & RUG CO., INC.,
a Corporation, and D.I. Eisenberg,

Appellant.

APPEAL FROM

SUPERIOR COURT

OF COOK COUNTY.

287 I.A. 616³

MR. JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendant from a judgment in the sum of \$1500, which was entered by the court in an action brought by the plaintiff against the defendant Lincoln Furniture & Rug Co., Inc. and D. I. Eisenberg, to recover damages for assault and battery alleged to have been committed on June 5, 1932. Defendant D. I. Eisenberg was dismissed from the suit at the trial on plaintiff's own motion, and all reference to the defendant hereafter will allude to the Lincoln Furniture & Rug Co. Inc.

On June 5, 1932, defendant, a corporation was engaged in the business of selling furniture at retail in Chicago. D. I. Eisenberg was its president and general manager at the time, having charge and control of the business. Prior to June 5, 1932, plaintiff and her husband had purchased certain furniture from the defendant on the installment plan, payment for which was secured by a chattel mortgage executed by them and delivered to the defendant. Plaintiff had defaulted in her payments and some conversation was had concerning the delinquent account, resulting in an agreement whereby defendant was to refinish a table top and deliver the same to plaintiff, who was to pay \$10 on the delinquent account when the table top was delivered to her.

On June 5, 1932, Berger, a truck driver for the defendant, was instructed by the president of the company to deliver the table

38738

ELIZABETH

Appellate

v.

LINCOLN FURNITURE & rug CO., INC.,
a Corporation, and E.I. Eisenberg,

Appellant.

SUPREME COURT

APPEAL FROM

OF COURT OF APPEALS

287 I.A. 616

THE JUSTICE SHALL DELIVER THE OPINION OF THE COURT.

This is an appeal by the defendant from a judgment in the sum of \$1500, which was entered by the court in an action brought by the plaintiff against the defendant Lincoln Furniture & rug Co., Inc. and E. I. Eisenberg, to recover damages for assault and battery alleged to have been committed on June 5, 1935. Defendant E. I. Eisenberg was dismissed from the suit at the trial on plaintiff's motion, and all reference to the defendant hereinafter will allude to the Lincoln Furniture & rug Co., Inc.

On June 5, 1935, defendant, a corporation was engaged in the business of selling furniture at retail in Chicago. E. I. Eisenberg was its president and general manager at the time, having charge and control of the business. Prior to June 5, 1935, plaintiff and her husband had purchased certain furniture from the defendant on the installment plan, payment for which was secured by a chattel mortgage executed by them and delivered to the defendant. Plaintiff had defaulted in her payments and some conversation was had concerning the defendant's account, resulting in an agreement whereby defendant was to refinish a table top and deliver the same to plaintiff, who was to pay \$10 on the defendant's account when the table top was delivered to her.

On June 5, 1935, earlier, a truck driver for the defendant, was instructed by the president of the company to deliver the table

top to plaintiff and to collect \$10 as a C. O. D. transaction. When Berger arrived at plaintiff's home he was admitted by her and informed that she did not have the \$10.

With plaintiff's permission Berger then telephoned to the place of business of the defendant for instructions as to whether he was to deliver the table top or return it to defendant's place of business because of plaintiff's failure to pay the \$10. The telephone was answered by Kogen, a salesman and shipping clerk for defendant. After receiving the telephone call, Kogen and Sam Eisenberg, the son of D. I. Eisenberg, drove to plaintiff's home in Sam Eisenberg's car. When they arrived at plaintiff's home they were admitted by either the plaintiff or plaintiff's son and a conversation was had concerning plaintiff's delinquent account, during which the plaintiff charges she was assaulted.

The amended declaration charged that the servants and employees of defendant, while engaged in repassessing furniture for defendant, entered the home of plaintiff and made an assault upon her, striking her on the breast and side, whereby the breast was required to be and was removed, the assault being within the scope of their employment; to the damage of plaintiff in the sum of \$25,000.

The defendant filed a plea of the general issue, and also a special plea claiming that the persons committing the alleged assault were not at the time and place mentioned in the declaration the agents or servants of defendant, nor engaged in or about the business of defendant.

The jury, after hearing the evidence, returned a verdict finding the defendant guilty and assessing plaintiff's damages at \$3,000. A remittitur of \$1500 was entered by the plaintiff and judgment entered for the plaintiff for \$1500. No question is raised in the briefs as to the sufficiency of the pleadings.

top to plaintiff and to collect \$10 as a U. C. D. transportation. Barker arrived at plaintiff's home and was admitted by her and father that he did not have the \$10.

With plaintiff's permission Barker then telephoned to the place of business of the defendant for instructions as to what he was to deliver the table top or return it to defendant's place of business because of plaintiff's failure to pay the \$10. The telephone was answered by Logan, a salesman and shipping agent for defendant. After receiving the telephone call, Logan and Sam Eisenberg, the son of U. I. Eisenberg, drove to plaintiff's home in Sam Eisenberg's car. When they arrived at plaintiff's home they were admitted by either the plaintiff or plaintiff's son and a conversation was had concerning plaintiff's delinquent account, during which the plaintiff charges she was assaulted.

The amended declaration charged that the servants and employees of defendant, while engaged in repossessing furniture for defendant, entered the home of plaintiff and made an assault upon her, striking her on the breast and side, whereby the breast was ruptured to be and was removed, the assault being within the scope of their employment; to the damage of plaintiff in the sum of \$10,000. The defendant filed a plea of the general issue, and also a special plea claiming that the persons committing the alleged assault were not at the time and place mentioned in the declaration the servants or servants of defendant, nor engaged in or about the business of defendant.

The jury, after hearing the evidence, returned a verdict finding the defendant guilty and assessing plaintiff's damages at \$2,000. A verdict of \$1000 was entered by the plaintiff and judgment entered for the plaintiff for \$1000. No question is raised in the briefs as to the sufficiency of the evidence.

It is not contradicted by any of the testimony in the record that the plaintiff and her husband purchased certain furniture from the defendant on the installment plan and there was a default in payments which resulted in an agreement that the defendant was to refinish a table top and deliver the table to the plaintiff, who was to pay \$10 on the delinquent account then due.

The controversy seems to be regarding what happened after defendant's truck driver, who was to deliver this table top to plaintiff and collect \$10 on the C. O. D. transaction, telephoned to his company regarding her failure to pay the \$10. The outcome of this conversation was that Mr. Kogen and the son of the president of the company went to the plaintiff's home, and after admittance the alleged assault occurred.

The plaintiff admitted she told Kogen to take the dining room furniture back, but, according to the evidence in the record, he persisted in removing such furniture as he deemed would be for the best interest of his company, and it was while he was attempting to move the furniture that the assault occurred when he threw his arm around plaintiff's neck and pushed her up against the wall, causing the injuries it is alleged the plaintiff suffered as a result of the assault.

The question stressed by the defendant is that the operation performed upon the plaintiff in removing her breast because of a cancerous condition could not have happened by reason of plaintiff's assault, and defendant's theory is that the evidence of the doctor introduced by the defendant was that a cancerous condition would not result from one assault only, but rather that the sore condition would be brought about by the continued abrasion of the area in which the cancer was developed.

However, plaintiff's doctor, who was also a witness, testi-

It is not contradicted by any of the testimony in the record that the Plaintiff and her husband, purchased certain furniture from the defendant on the installment plan and there was a default in payments which resulted in an agreement that the defendant was to refinish a table top and deliver the table to the Plaintiff, who was to pay \$10 on the defendant account thereon.

The controversy seems to be regarding what happened after defendant's truck driver, who was to deliver this table top to Plaintiff and collect \$10 on the U. S. A. transaction, telephoned to his company regarding her failure to pay the \$10. The outcome of this conversation was that Mr. Hogan and the son of the president of the company went to the Plaintiff's home, and after consultation the alleged assault occurred.

The Plaintiff admitted she told Hogan to take the dining room furniture back, but, according to the evidence in the record, he persisted in removing such furniture as he deemed would be for the best interest of his company, and it was while he was attempting to move the furniture that the assault occurred when he threw his arm around Plaintiff's neck and pushed her up against the wall, causing the injuries it is alleged the Plaintiff suffered as a result of the assault.

The question stressed by the defendant is that the assault performed upon the Plaintiff in removing her private possession of a dangerous condition could not have happened by reason of Plaintiff's assault, and defendant's theory is that the evidence of the assault introduced by the defendant and that a dangerous condition would not result from one assault only, but rather that the same condition would be brought about by the continued existence of the same in which the assault was developed.

However, Plaintiff's doctor, who was also a witness, testi-

fied he removed the cancerous growth and made a microscopic examination of the tissue removed and that he was sustained in his diagnosis that the condition was cancerous. While we have the evidence of the doctors - which evidence was before the jury - that a cancerous condition may result from a bruise, the disputed question is whether such condition could develop from the assault alleged to have occurred when Mr. Kogen pushed the plaintiff against the wall with his arm around her neck, causing the bruise complained of by the plaintiff. These questions of fact were clearly ones for the jury, and we think they are sufficient in the record to justify the verdict of the jury.

It is contended there is no basis in the evidence for the damages awarded. As we have already indicated, the assault and the result thereof were questions of fact for the jury. No doubt upon considering the evidence of the doctors, the jury reached the conclusion that the verdict was justified.

As to whether or not the defendant is liable for the acts of its agent Kogen, it appears, as above stated, that Kogen came in response to a telephone message received by the defendant company at its place of business; that he came on an errand in connection with defendant's business, and after arriving at plaintiff's home talked with her regarding the payment for the furniture, and in attempting to enforce collection tried to remove the furniture from plaintiff's home, and, in determining to carry out the purpose of his visit for the benefit of the defendant company, assaulted the plaintiff.

The plaintiff in support of her position cites the case of Carlberg v. Spiegels House Furnishing Co., 178 Ill. App. 424, where the court said:

He removed the cancerous growth and made a microscopic examination of the tissue removed and that he was satisfied in his opinion that the condition was cancerous. While we have the evidence of the doctors - which evidence was before the jury - that a cancerous condition may result from a bruise, the disputed question is whether such condition could develop from the assault alleged to have occurred when Mr. Kogan was pushed the plaintiff against the wall with his arm around her neck, causing the bruise complained of by the plaintiff. These questions of fact were clearly ones for the jury, and we think they are sufficient in the record to justify the verdict of the jury.

It is contended there is no basis in the evidence for the damages awarded. As we have already indicated, the assault and the result thereof were questions of fact for the jury. We doubt upon considering the evidence of the doctors, the jury reached the conclusion that the verdict was justified.

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The plaintiff in support of her position offers the case of Gilbert v. Spaulding House Furnishing Co., 175 Ill. App. 424, where the court said:

"It is urged as a ground for reversal that the verdict and judgment was contrary to the great weight of the evidence. In that connection it is claimed that the preponderance of the evidence shows that the entry into plaintiff's house was peaceable, and the search was permitted and participated in by the plaintiff. Upon a careful examination of the evidence, we think that it justifies the verdict of the jury. We are unable to perceive any ground, upon the merits of the case, for interfering with the verdict and judgment."

The defendant is liable for the wanton and wilful acts of its agents in the line of their employment and in the course thereof, while pursuing the business of the defendant. Keedy v. Howe, 72 Ill. 133; Singer Mfg. Co. v. Holdfodt, 86 Ill. 455; Ziegenhein Furniture Co. v. Smith, 116 Ill. App. 80. The evidence shows that the employees of defendant were engaged in the business of the defendant at the time of the trespass for which suit was brought, and that their acts were wanton and wilful, and performed in the line of their employment and under the instructions of the manager of the collection department of defendant. The defendant is clearly liable for the acts shown in the record."

This authority substantiates our position that the court was fully justified in refusing to grant a new trial.

The point is made by the defendant that plaintiff's counsel made improper and prejudicial remarks during defendant's argument to the jury, and for this reason the court erred in not granting a new trial. We have examined the record to determine whether the defendant was prejudiced by the attitude of counsel for the plaintiff, and are unable to say that there were prejudicial remarks which would justify this court in interfering with the verdict of the jury, and the judgment entered.

On the question of the remittitur, the trial court was in a position to consider this matter, having before it the attitude of the parties in interest, and when the court concluded and suggested to the plaintiff that a remittitur be entered the plaintiff was satisfied and judgment was entered with plaintiff's consent. We do not see that any error resulted from this action of the court. On the contrary, we believe the verdict was a fair and equitable one.

The judgment is affirmed.

JUDGMENT AFFIRMED.

DENIS E. SULLIFAN, P.J. AND HALL, J. CONCUR.

"It is urged as a ground for reversal that the verdict and judgment was contrary to the great weight of the evidence. In that connection it is claimed that the preponderance of the evidence shows that the entry into plaintiff's home was peaceful, and the search was permitted and participated in by the plaintiff. Upon a careful examination of the evidence, we think that it justifies the verdict of the jury. We are unable to perceive any ground, upon the merits of the case, for interfering with the verdict and judgment."

The defendant is liable for the action and willful acts of its agents in the line of their employment and in the course thereof, while pursuing the business of the defendant. See Wright v. New York, 18 Ill. 120; Singer Mfg. Co. v. Hoffman, 33 Ill. 433; Chicago Furniture Co. v. Balth, 116 Ill. App. 23. The evidence shows that the employees of defendant were engaged in the business of the defendant at the time of the trespass for which suit was brought, and that their acts were wilful and wrongful, and performed in the line of their employment and under the instructions of the manager of the collection department of defendant. The defendant is clearly liable for the acts shown in the record."

This authority substantiates our position that the court was fully justified in refusing to grant a new trial. The point is made by the defendant that plaintiff's counsel made improper and prejudicial remarks during defendant's argument to the jury, and for this reason the court erred in not granting a new trial. We have examined the record to determine whether the defendant was prejudiced by the attitude of counsel for the plaintiff and are unable to say that there were prejudicial remarks which would justify this court in interfering with the verdict of the jury, and the judgment entered. On the question of the remittitur, the trial court was in position to consider this matter, having before it the attitude of the parties in interest, and when the court concluded and suggested to the plaintiff that a remittitur be entered the plaintiff has established judgment was entered with plaintiff's consent. We do not see what error resulted from this action of the court. On the contrary, we believe the verdict was a fair and equitable one. The judgment is affirmed.

38745

HARTFORD ACCIDENT & INDEMNITY CO.,
a Corporation,

v.

FEDERAL ELECTRIC CO., a Corporation,
James M. Gilchrist, Agent,

FEDERAL ELECTRIC CO., a Corporation,
James M. Gilchrist, Agent,

Appellee,

v.

HARRY LANG,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

287 I.A. 616⁴

MR. JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT.

On February 18, 1935, the plaintiff instituted suit against the defendant, alleging, among other things, in its filed statement that this defendant was indebted to it in the sum of \$111 for renewal premiums with reference to a bond heretofore given to the City of Chicago, pertaining to an electric sign located at 3025 Lincoln Avenue, Chicago, Illinois; that thereafter the defendant, Federal Electric Co. entered its appearance, and an order was issued by the Municipal Court of Chicago, giving leave to this defendant to make Harry Lang, and Roman Furniture Mart, Inc. third party defendants.

That there was filed in the Municipal Court by the Hartford Accident & Indemnity Co., plaintiff, a copy of an application for the indemnity bond involved herein, wherein the Federal Electric Co. agreed to pay to the Hartford Accident & Indemnity Co. the sum of \$30 premium upon the execution of the bond, and \$30 on the 14th day of May in each year thereafter until the Federal Electric Co. shall serve upon the Hartford Accident & Indemnity Co. at its home office,

HARTFORD ACCIDENT & INDEMNITY CO.,
a Corporation,

v.

FEDERAL ELECTRIC CO., a Corporation,
James M. Gilchrist, Agent,

FEDERAL ELECTRIC CO., a Corporation,
James M. Gilchrist, Agent,

Appellee,

v.

HARRY KANE,
Appellant.

MUNICIPAL COURT

OF CHICAGO.

MR. JUSTICE HERBEN DENIED THE OPINION OF THE COURT.

On February 18, 1935, the plaintiff instituted suit

against the defendant, alleging, among other things, in its filed

statement that this defendant was indebted to it in the sum of \$111

for renewal premiums with reference to a bond heretofore given to

the City of Chicago pertaining to an electric sign located at 7035

Lincoln Avenue, Chicago, Illinois; that thereafter the defendant,

Federal Electric Co., entered its appearance, and an order was issued

by the Municipal Court of Chicago, giving leave to this defendant

to make Harry Kane, and Roman Furniture Mart, Inc. third party

defendants.

That there was filed in the Municipal Court by the Hartford

Accident & Indemnity Co., plaintiff, a copy of an application for

the indemnity bond involved herein, wherein the Federal Electric Co.

agreed to pay to the Hartford Accident & Indemnity Co. the sum of

\$50 premium upon the execution of the bond, and (3) on the 14th day

of May in each year thereafter until the Federal Electric Co. shall

serve upon the Hartford Accident & Indemnity Co. at its home office,

387 I.A. 616

competent written legal evidence of its final discharge from such bond and all liability by reason thereof, and that the said Federal Electric Co. will, at all times, indemnify and keep indemnified the Hartford Accident & Indemnity Co., and hold and save it harmless from and against any and all damages, loss, costs, charges and expenses of whatsoever kind or nature, including counsel and attorney fees, which the surety, to-wit: Hartford Accident & Indemnity Co. shall at any time sustain or incur by reason or in consequence of having executed said bond.

The defendant Federal Electric Co. filed in the Municipal Court of Chicago, the statement of its claim, impleading said Harry Lang; and stated in substance, among other things, that according to law, equity and good conscience the premiums should be paid, together with any other proper charges, by Harry Lang and the said Roman Furniture Mart, and prayed that judgment be entered against the defendant Harry Lang and the Roman Furniture Mart in the sum of \$111.

On March 19, 1935, an affidavit of merits was filed by the defendant Federal Electric Co., wherein it claimed that the premiums should be paid by Harry Lang and the Roman Furniture Mart.

On November 14, 1935, a judgment was entered in favor of the Hartford Accident & Indemnity Co. and against the Federal Electric Co. in the sum of \$60. and at the same time a judgment was entered in favor of the Federal Electric Co. and against Harry Lang, the third party defendant, in the sum of \$80.

From an order entered on March 13, 1936, it appears that the suit was dismissed as to the defendants, James M. Gilchrist and the Roman Furniture Mart, third parties defendant, and the judgment was amended changing the amount against the Federal Electric Company, the original defendant, to \$80., and assessing the same amount against Harry Lang.

competent written legal evidence of the final discharge from each bond and all liability by reason thereof, and that the said Federal Electric Co. will, at all times, indemnify and keep indemnified the Hartford Accident & Indemnity Co., and hold and save it harmless from and against any and all damages, loss, costs, charges and expenses of whatever kind or nature, including counsel and attorney fees, which the surety, to-wit: Hartford Accident & Indemnity Co. at any time sustain or incur by reason or in consequence of making executed said bond.

The defendant Federal Electric Co. filed in the Municipal Court of Chicago, the statement of its claim, impugning said Harry Lang, and stated in substance, among other things, that according to law, equity and good conscience the premiums should be paid, together with any other proper charges, by Harry Lang and the said Roman Furniture Mart, and prayed that judgment be entered against the defendant Harry Lang and the Roman Furniture Mart in the sum of \$111.

On March 19, 1935, an affidavit of merits was filed by the defendant Federal Electric Co., wherein it claimed that the premiums should be paid by Harry Lang and the Roman Furniture Mart. On November 1, 1935, a judgment was entered in favor of the Hartford Accident & Indemnity Co. and against the Federal Electric Co. in the sum of \$30, and at the same time a judgment was entered in favor of the Federal Electric Co. and against Harry Lang, the third party defendant, in the sum of \$81.

From an order entered on March 15, 1936, it appears that the suit was dismissed as to the defendant, James M. Dickel and the Roman Furniture Mart, third parties defendant, and the judgment was amended changing the account against the Federal Electric Company, the original defendant, to \$50., and cancelling the same amount against Harry Lang.

The appeal is in this court by Harry Lang from a judgment of \$80 entered against him as a third party defendant in the proceedings heard in the Municipal Court.

The claim of the plaintiff for the amount of the judgment is admitted by the original defendant, and from the record it is apparent that under the terms of the application for the surety bond the original defendant was never released from its obligation to pay the premiums as they accrued from time to time to the plaintiff.

It is to be noted that there is a provision in the contract for steps to be taken by the original defendant, the language of which is as follows:

"That the undersigned will pay to the Surety \$30.00 premium upon execution of the bond, and \$30.00 on the 14th day of May in each year thereafter and until the undersigned shall serve upon the Surety at its Home Office, competent written legal evidence of its final discharge from such bond, and all liability by reason thereof."

By defendant's admission that it was liable to the plaintiff, we are led to the conclusion that no steps were taken under the provision of this contract which would release this defendant, and it would seem that this proceeding is subject to certain rules adopted by the Municipal Court whereby a defendant, in a proper case, may make application to add a third party defendant to the action.

In the first place as we view the record, the contract is between the plaintiff and the original defendant, and the defendant acquired title to the sign subsequent to the signing of the agreement between the plaintiff and the original defendant.

The ground upon which the Federal Electric Co. seeks to recover is that in equity and good conscience Harry Lang, a third party defendant, should pay the premiums.

However, the defendant Federal Electric Co. makes the point that Harry Lang did not file any defense or affidavit of

The appeal is in this court by Harry Lang from a judgment of 80 entered against him as a third party defendant in the proceedings heard in the Municipal Court.

The claim of the plaintiff for the amount of the judgment is admitted by the original defendant, and from the record it is apparent that under the terms of the application for the surety bond the original defendant was never released from its obligation to pay the premiums as they accrued from time to time to the plaintiff.

It is to be noted that there is a provision in the contract for steps to be taken by the original defendant, the language of which is as follows:

"That the undersigned will pay to the Surety \$20.00 premium upon execution of the bond, and \$30.00 on the 1st day of May in each year thereafter and until the undersigned shall serve upon the Surety at its Home Office, competent written legal evidence of its final discharge from such bond, and all liability by reason thereof."

By defendant's admission that it was liable to the plaintiff, we are led to the conclusion that no steps were taken under the provision of this contract which would release this defendant, and it would seem that this proceeding is subject to certain rules adopted by the Municipal Court whereby a defendant, in a proper case, may make application to add a third party defendant to the action.

In the first place as we view the record, the contract is between the plaintiff and the original defendant, and the defendant acquired title to the sign subsequent to the signing of the agreement between the plaintiff and the original defendant. The ground upon which the Federal Electric Co. seeks to recover is that in equity and good conscience Harry Lang, a third party defendant, should pay the premiums.

However, the defendant Federal Electric Co. makes the point that Harry Lang did not file any defense or affidavit in

merits to the statement of claim of the Federal Electric Company. While he was not required to do this, still this court is obliged to assume in this, a fourth class case where evidence was heard by the court, that the court, upon considering the evidence before it, was justified in entering the judgment, and we as a court of review cannot in the absence of a bill of exceptions containing the evidence, determine from the record whether or not the trial court was in error. Therefore it will be presumed that the evidence was sufficient to sustain the finding of the court, and that the judgment should not be disturbed.

In a case of this classification, the rule is that the evidence introduced will control in determining the issues between the parties, notwithstanding the statement of claim.

The questions called to our attention by the third party defendant are interesting, but not having a complete record and our decision necessarily depending upon the evidence, we are not in a position to determine that the court erred; on the contrary, where the evidence is not preserved, this court will, as heretofore stated, assume that the court heard proper evidence to sustain the judgment.

For the reasons stated, we are of the opinion that the judgment should be affirmed. Accordingly the judgment is affirmed.

JUDGMENT AFFIRMED.

DENIS E. SULLIVAN, P.J. AND HALL, J. CONCUR.

merits to the statement of claim of the Federal Electric Company. While he was not required to do this, still this court is obliged to assume in this, a fourth class case where evidence was heard by the court, that the court, upon considering the evidence before it, was justified in entering the judgment, and we as a court of review cannot in the absence of a bill of exceptions containing the evidence determine from the record whether or not the trial court was in error. Therefore it will be presumed that the evidence was admitted to sustain the finding of the court, and that the judgment should be affirmed.

In a case of this classification, the rule is that the evidence introduced will control in determining the issues between parties, notwithstanding the statement of claim. The questions called to our attention by the third party defendant are interesting, but not having a complete record and our decision necessarily depending upon the evidence, we are not in a position to determine that the court erred; on the contrary, where the evidence is not preserved, this court will, as heretofore at the time that the court heard proper evidence to sustain the judgment. For the reasons stated, we are of the opinion that the judgment should be affirmed. Accordingly the judgment is affirmed.

JUDGMENT AFFIRMED.

DENIS E. SULLIVAN, P. J. AND HALL, J. CONCUR.

38762

J. P. ROGERS,

Appellee,

v.

MAURICE L. COWEN,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

287 I.A. 617¹

MR. JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendant from an order of the Municipal Court of Chicago denying his motion to vacate a judgment by confession.

On November 25, 1935, the plaintiff filed his cognovit and obtained judgment against the defendant for \$65 on two judgment notes, each in the sum of \$25. On December 11, 1935, the defendant filed his motion to vacate the judgment, and in support of the motion filed his verified affidavit. After argument the court denied the motion to vacate and set aside the judgment.

The verified affidavit filed in support of defendant's motion to set aside the judgment states that on November 25, 1935, judgment by confession was entered by the court, and that on November 29, 1935, the bailiff returned an execution nulla bona.

Garnishment proceedings were then instituted by the plaintiff and the defendant received a notice from his bank of the entry of the judgment and that summons in garnishment had been served on it.

The affidavit further states as a defense to plaintiff's claim that the notes sued upon were executed by the defendant and delivered to the Macklam Refrigerator Sales and Service Company as part of the purchase price of a refrigerator; that the plaintiff

287 I.A. 617

OF CHICAGO.

MUNICIPAL COURT

APPEAL FROM

Appellee,

v.

MAURICE L. GOWEN,

Appellant.

J. P. MOORE,

38763

MR. JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendant from an order of the Municipal Court of Chicago denying his motion to vacate a judgment by confession.

On November 25, 1935, the plaintiff filed his cognovit and obtained judgment against the defendant for \$5 on two judgment notes, each in the sum of \$5. On December 11, 1935, the defendant filed his motion to vacate the judgment, and in support of the motion filed his verified affidavit. After argument the court denied the motion to vacate and set aside the judgment.

The verified affidavit filed in support of defendant's motion to set aside the judgment states that on November 25, 1935, judgment by confession was entered by the court, and that on November 29, 1935, the bailiff returned an execution nulla bona.

Garnishment proceedings were then instituted by the plaintiff and the defendant received a notice from his bank of the entry of the judgment and that summons in garnishment had been served on it.

The affidavit further states as a defense to plaintiff's claim that the notes sued upon were executed by the defendant and delivered to the Chicago Refrigerator Sales and Service Company as part of the purchase price of a refrigerator; that the plaintiff

was the salesman of the Macklam Company in this transaction; that the purchase price of the refrigerator was \$180, of which the defendant paid \$80 at the time of the sale, and signed and delivered to this Company four notes in the sum of \$25 each, payable to the order of the Macklam Company in monthly installments; that at the time of the sale it was agreed between the defendant and the Macklam Company, in the presence of the plaintiff, that should the defendant return the refrigerator within forty-five days of the sale, any unpaid balance of the purchase price would be cancelled, and that the plaintiff, as the agent of the Macklam Company would attempt to resell the refrigerator; and that if no loss resulted, the money paid by the defendant would be refunded. It is further stated by affiant that within forty-five days of the sale the defendant returned the refrigerator to the Macklam Company and the Company accepted return of the refrigerator.

It is further stated by affiant that after the sale referred to, the plaintiff left the employ of the Macklam Company and plaintiff obtained the two notes sued upon by the exercise of duress upon one of the officers of the Macklam Company; that the notes payable to the order of the Macklam Company had never been endorsed by any authorized representative of the Company, and that the endorsement appearing on the said notes was in effect a forgery.

As a general rule, a judgment by confession will be set aside by the court in order that the defendant be given leave to defend upon a motion promptly made and supported by an affidavit; provided the affidavit sets forth a good and meritorious defense to the claim. This motion to open or vacate the judgment by confession so as to allow defendant to plead a defense is addressed to the sound discretion and to the equitable powers of the court, provided that the motion is supported by affidavit or other evidence tending to show that applicant has not been guilty of laches.

was the salesman of the Mackiam Company in this transaction; that the purchase price of the refrigerator was \$180, of which the defendant paid \$80 at the time of the sale, and signed and delivered to this Company four notes in the sum of \$25 each, payable to the order of the Mackiam Company in monthly installments; that at the time of the sale it was agreed between the defendant and the Mackiam Company, in the presence of the plaintiff, that should the defendant return the refrigerator within forty-five days of the sale, any unpaid balance of the purchase price would be cancelled, and that the plaintiff, as the agent of the Mackiam Company would attempt to resell the refrigerator; and that if no loss resulted, the money paid by the defendant would be refunded. It is further stated by affidavit that within forty-five days of the sale the defendant returned the refrigerator to the Mackiam Company and the Company accepted return of the refrigerator.

It is further stated by affidavit that after the sale referred to, the plaintiff left the employ of the Mackiam Company and plaintiff obtained the two notes sued upon by the exercise of duress upon one of the officers of the Mackiam Company; that the notes payable to the order of the Mackiam Company had never been endorsed by any authorized representative of the Company, and that the endorsement appearing on the said notes was in effect a forgery.

As a general rule, a judgment by confession will be set aside by the court in order that the defendant be given leave to defend upon a motion promptly made and supported by an affidavit, provided the affidavit sets forth a good and meritorious defense to the claim. This motion to open or vacate the judgment by confession so as to allow defendant to plead a defense is addressed to the sound discretion and to the equitable powers of the court, provided that the motion is supported by affidavit or other evidence tending

From the facts as they appear in the affidavit, it would seem that as soon as the defendant had notice of the proceeding and was advised by his bank of the entry of the judgment and that garnishment proceedings had been instituted against his bank account, he presented this motion.

The question then arises whether by the affidavit filed in support of his motion, the defendant presented facts tending to show that he had a good and meritorious defense to plaintiff's claim.

From the affidavit of the defendant it appears that there had been an oral agreement between the Macklam Company and the defendant that should the defendant decide to return the refrigerator within forty-five days, the Macklam Company would accept the return, and that the plaintiff as its salesman would attempt to resell it and if no loss resulted, the money paid on account by the defendant would be returned. This defense is based on a sale upon a condition subsequent and a mutual rescission by the parties when the refrigerator was returned and accepted by the Macklam Company. In the opinion in Fuchs & Lang Co. v. Kittredge & Co., 242 Ill. 88, the court said:

"The rule (that parol evidence cannot vary a written agreement) is a familiar one, but it is subject to the qualification that a separate parol agreement as to any matter not inconsistent with the terms or legal effect of the written agreement, and on which it is silent, may be shown, where it appears that the written instrument was not intended to be a complete and final statement of the whole transaction between the parties."

This rule is further illustrated in the case of Drosdoff v. Fetzer, 178 Ill. App. 336, called to our attention by the defendant. The court in passing upon the claim presented held that where there is a rescission of a contract by mutual consent, the parties should be put by each other as nearly as possible in "statu quo ante, etc.," and the law will compel a final adjustment to this end where only a part of it has been made.

From the facts as they appear in the affidavits, it would seem that as soon as the defendant had notice of the proceedings and was advised by his bank of the entry of the judgment and that garnishment proceedings had been instituted against his bank account, he presented this motion.

The question then arises whether by the affidavits filed in support of his motion, the defendant presented facts tending to show that he had a good and meritorious defense to plaintiff's claim. From the affidavits of the defendant it appears that there

had been an oral agreement between the Western Company and the defendant that should the defendant decide to return the refrigerator within forty-five days, the Western Company would accept the return, and that the plaintiff as its salesman would attempt to recall it and if no loss resulted, the money paid on account by the defendant would be returned. This release is based on a sale upon a condition subsequent and a mutual rescission by the parties when the refrigerator was returned and accepted by the Western Company. In the opinion in Woods v. Lane Co. v. Refrigerator Co., 222 Ill. 88, the court said:

"The rule (that parol evidence cannot vary a written agreement) is a familiar one, but it is subject to the qualification that a separate parol agreement as to any matter not inconsistent with the terms or legal effect of the written agreement, and on which it is silent, may be shown, where it appears that the written instrument was not intended to be a complete and final statement of the whole transaction between the parties."

This rule is further illustrated in the case of Wheaton v. Fetter, 178 Ill. App. 2nd, called to our attention by the defendant. The court in passing upon the claim presented held that where there is a recission of a contract by mutual consent, the parties should be put by each other as nearly as possible in "status quo ante, etc." and the law will compel a final adjustment to this end where only a part of it has been made.

Again, in the case of Green v. Ryan, 242 Ill. App. 466, Ryan sold a cow to Green. Being dissatisfied with the breeding qualities of the cow, Green returned her to Ryan, and filed a suit to recover the purchase price. In affirming a judgment for Green the Court said:

"The inference is clear from the evidence that the contract of sale involved, after the return of the cow to the appellant, was treated by both parties as rescinded, and the permanent retention of the cow by the appellant without any explanation to the appellee, * * * justifies the conclusion that the appellant regarded the sale as rescinded * * * and that the cow had again become his property."

So far as the facts have been presented to the court upon this motion, it appears that the Macklam Company accepted the return of the refrigerator, and under the law the defendant is absolved from liability on the notes, for the reason that the plaintiff was not a holder in due course of these notes, but had knowledge of the agreement between the parties and the acts leading to the rescission of this contract.

It is also contended that the endorsement of the notes was not authorized by the payee, but was a forgery, and that the plaintiff was not entitled to recover for the amount of these notes. However, since we are of the opinion that the defendant has a defense which should be submitted, we express no opinion upon this question, but consider only such facts as are sufficient to grant leave to the defendant to offer his defense and the judgment to stand as security.

For the reasons stated the order of the court denying the defendant's motion is reversed and the cause is remanded with direction that the defendant be granted leave to defend, the judgment to stand as security.

REVERSED AND REMANDED WITH DIRECTIONS.

DENIS E. SULLIVAN, P.J. AND HALL, J. CONCUR.

Again, in the case of Ryan v. Ryan, 103 Ill. App. 408, Ryan sold a cow to Green. Being dissatisfied with the breeding qualities of the cow, Green returned her to Ryan, and filed a suit to recover the purchase price. In affirming a judgment for Green the Court said:

"The inference is clear from the evidence that the contract of sale involved, after the return of the cow to the appellant, was treated by both parties as rescinded, and the permanent retention of the cow by the appellant without any explanation to the appellee, justifies the conclusion that the appellant resold the cow as rescinded * * * and that the cow had again become his property."

So far as the facts have been presented to the court upon this motion, it appears that the Mackham Company accepted the return of the refrigerator, and under the law the defendant is relieved from liability on the notes, for the reason that the plaintiff was not a holder in due course of these notes, but had knowledge of the agreement between the parties and the note leading to the rescission of this contract.

It is also contended that the endorsement of the notes was not authorized by the payee, but was a forgery, and that the plaintiff was not entitled to recover for the amount of these notes. However, since we are of the opinion that the defendant was a holder which should be admitted, we express no opinion upon this question, but consider only such facts as are sufficient to grant leave to the defendant to offer his defense and the judgment to stand as

security. For the reasons stated the order of the court denying the defendant's motion is reversed and the cause is remanded with directions that the defendant be granted leave to defend, the judgment to stand as security.

REVEREND AND HONORABLE THE COURT,

38776

MARIONA ENGELIS,

Appellee,

v.

DOUISETTE ENZELIS, since remarried
and now known as DOMICELE MARTISIUS,

Appellant.

241
APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

287 I.A. 617²

MR. JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendant from an order entered in the Municipal Court of Chicago, denying leave to the defendant to plead to a judgment entered by confession, which was based upon a promissory note in the possession of the plaintiff.

On July 25, 1935, the plaintiff filed a statement of claim based on a judgment note signed by the defendant, upon which confession of judgment was entered by the court in the sum of \$3,482.09.

In the verified petition of the defendant for leave to defend, it is stated that there was no consideration for the execution of the note on which judgment was confessed, and also that \$900 interest had been paid by the defendant to the plaintiff, for which no credit was given.

It is further stated that on the face of the note plaintiff was entitled only to the principal sum of \$2,000, plus interest at five per cent per annum from August 27, 1925, to July 25, 1935, a period of less than ten years; that the amount due for principal and interest for the period set forth would amount to the sum of \$2,991.24; that the judgment entered was for \$3,237.71, plus \$244.38, attorney's fees, making a total sum of \$3,482.09, and that the judgment on the face of the record is excessive in at least the sum of \$246.47.

Upon the question of diligence of the defendant in making

3871A.615

APPELLANT

APPELLEE

v.

DOMINIC M. MARLINO, since remarried
and now known as DOMINIC MARLINO

APPELLANT

APPEAL FROM

ORIGINAL COURT

OF CHICAGO

3871A.615

MR. JUSTICE WELLS DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendant from an order entered in the Municipal Court of Chicago, denying leave to the defendant to plead to a judgment entered by confession, which was based upon a promissory note in the possession of the plaintiff.

On July 25, 1935, the plaintiff filed a statement of claim based on a judgment note signed by the defendant, upon which confession of judgment was entered by the court in the sum of \$2,482.00.

In the verified petition of the defendant for leave to defend, it is stated that there was no consideration for the execution of the note on which judgment was confessed, and also that \$500 interest had been paid by the defendant to the plaintiff, for which no receipt was given.

It is further stated that on the face of the note plaintiff was entitled only to the principal sum of \$2,000, plus interest at 10 per cent per annum from August 17, 1932, to July 25, 1935, a period of less than ten years; that the amount due the principal and interest for the period set forth would amount to the sum of \$2,582.00; that the judgment entered was for \$2,482.00, less \$100.00, attorney's fees, leaving a total sum of \$2,482.00, and that the judgment on the face of the record is excessive in that it is for the sum of \$2,482.00.

Upon the question of diligence of the defendant in making

application for leave to appear and file a defense, it appears that she did not know judgment was entered until August 8, 1935, when an execution was served upon her; that immediately thereafter she employed one known as Fraelig, who represented himself to be an attorney, and who as an attorney was to take care of her interest in the matter; that at that time this alleged attorney presented her with a card, which was in the usual form used by attorneys, with his name as an attorney at law, telephone and street number; that she paid a retainer fee of \$25, and later, \$75, making a total of \$100, to represent her in the matter; that she is a woman of foreign birth, not conversant with the English language, and assumed that her interests were being protected; that on September 21, 1935, she received a letter from plaintiff's attorney, and immediately tried to locate her attorney, but was unable to do so. Thereafter the attorney now appearing before this court was employed.

The plaintiff urges that there was a lack of diligence on the part of the defendant in applying to the court for an order permitting her to offer the defense set forth in her affidavit of facts appearing in this record. The defendant urges that she made nine payments of \$100 each for interest due and payable under the terms of the note in question, and that she received no consideration for the execution of the note, and she states in her affidavit that she signed the note because of the persistent urging of a sister-in-law who had loaned the money to her brother, since deceased.

The fact that the defendant signed the note evidencing such loan, and the question of whether the affidavit correctly states what took place, are questions of fact for the court or a jury, and our only purpose in discussing the facts is to determine whether the court erred in not granting leave to the defendant to offer such defense as she set forth in her affidavit.

application for leave to appear and file a defense, it appears that she did not know judgment was entered until August 8, 1935, when execution was served upon her; that immediately thereafter she employed one known as Israel, who represented himself to be an attorney, and who as an attorney was to take care of her interest in the matter; that at that time this alleged attorney presented her with a card, which was in the usual form used by attorneys, with his name as an attorney at law, telephone and street number; that she paid a retainer fee of \$25, and later, \$75, making a total of \$100, to represent her in the matter; that she in a woman of foreign birth not conversant with the English language, and assumed that her interests were being protected; that on September 21, 1935, she received a letter from Plaintiff's attorney, and immediately tried to locate her attorney, but was unable to do so. Thereafter the attorney now appearing before this court was employed.

The Plaintiff urges that there was a lack of diligence on the part of the defendant in applying to the court for an order permitting her to offer the defense set forth in her affidavit of facts appearing in this record. The defendant urges that she made nine payments of \$100 each for interest due and payable under the terms of the note in question, and that she received no acknowledgment for the execution of the note, and she states in her affidavit that she signed the note because of the persistent urging of a sister-in-law who had loaned the money to her brother, since deceased.

The fact that the defendant signed the note existing on loan, and the question of whether the affidavit correctly states what took place, are questions of fact for the court or a jury, and are only purposes in discussing the facts is to determine whether the court erred in not granting leave to the defendant to offer such defense as she set forth in her affidavit.

The plaintiff admits that there was error in the computation of interest, and that the judgment was for a larger amount than she was entitled to recover. This, together with the fact that there is the statement that defendant had been paying interest for a period of nine years, for which she had received no credit, in and of itself is sufficient to justify the court in granting leave to the defendant to file a plea in defense, and failure to grant such leave was error.

From these facts alone, we are of the opinion that the defendant is entitled to present her defense, and by reason of plaintiff's admission that the amount is larger than she is entitled to recover, the judgment is reversed and the cause is remanded to the trial court with directions to enter such other and further orders as may be consistent with the views herein expressed.

REVERSED AND REMANDED WITH DIRECTIONS.

DENIS E. SULLIVAN, P.J. AND HALL, J. CONCUR.

The plaintiff admits that there was error in the computation of interest, and that the judgment was for a larger amount than she was entitled to recover. This, together with the fact that there is the statement that defendant had been paying interest for a period of nine years, for which she had received no credit, in and of itself is sufficient to justify the court in granting leave to the defendant to file a plea in defense, and to allow to present such leave was given.

From these facts alone, we are of the opinion that the defendant is entitled to present her defense, and by reason of plaintiff's admission that the amount is larger than she is entitled to recover, the judgment is reversed and the case is remanded to the trial court with directions to enter such other and further orders as may be consistent with the views herein expressed.

REVEREND AND HONORABLE JUDGES OF THE COURT.

DEWITT C. SULLIVAN, J. J. AND HILL, J. CONCUR.

38811

PEOPLE OF THE STATE OF ILLINOIS,

Defendant in Error,

v.

HARRY STROM,

Plaintiff in Error.

ERROR TO THE

CRIMINAL COURT

COOK COUNTY.

287 I.A. 617³

MR. JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT.

This case is in the court upon a writ of error brought by the defendant to have reviewed the record of the Criminal Court of Cook County, wherein it appears that the defendant was indicted on June 21, A. D. 1934, upon three counts, as follows:

The first count charged the said defendant with having made an assault with a pistol upon one Walter Garazin, on May 22, 1934, in County of Cook and State of Illinois with intent to kill and murder said Walter Garazin; the second count charges said assault was with intent to inflict a bodily injury, with a pistol; and the third count charges said assault with intent to inflict a bodily injury, with a certain hard substance.

Upon a hearing of the crime alleged in the indictment, the jury on October 8, 1934, found the defendant guilty of assault with a deadly weapon with intent to inflict upon the person of another a bodily injury. Subsequently, on October 16, 1934, the court overruled a motion for a new trial and in arrest of judgment. Thereupon judgment was entered on said date, sentencing the defendant to the House of Correction for one year, and to pay a fine of \$200.

From the facts it appears that on May 23, 1934, while one Edward Perlowski was at his home on the first floor of 2343 West Iowa Street, Chicago, Illinois, at about 12:30, he heard a loud report, after which he went to the kitchen of his dwelling and saw that plaster was down from the ceiling; that the landlord was called and

3881

PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,
v.
HARRY STROM,
Plaintiff in Error.

CRIMINAL COURT

COOK COUNTY.

287 I.A. 617

MR. JUSTICE DELIVERED THE OPINION OF THE COURT.

This case is in the court upon a writ of error brought by the defendant to have reviewed the record of the criminal court of Cook County, wherein it appears that the defendant was indicted on June 21, A. D. 1884, upon three counts, as follows:

The first count charged the said defendant with having made an assault with a pistol upon one Walter Garstin, on May 11, 1884, in County of Cook and State of Illinois with intent to kill and murder said Walter Garstin; the second count charges said assault was with intent to inflict a bodily injury, with a pistol; and the third count charges said assault with intent to inflict a bodily injury, with a certain hard substance.

Upon a hearing of the crime alleged in the indictment, the jury on October 8, 1884, found the defendant guilty of assault with a deadly weapon with intent to inflict upon the person of another a bodily injury. Subsequently, on October 12, 1884, the court entered a new trial and in arrest of judgment. Judgment was entered on said date, sentencing the defendant to the House of Correction for one year, and to pay a fine of \$500.

From the facts it appears that on May 25, 1884, while one Edward Polonski was at his home on the first floor of 2343 East 1st Street, Chicago, Illinois, at about 12:30, he heard a loud report, after which he went to the kitchen of his dwelling and saw that plaster was down from the ceiling; that the landlord was called and

he came and looked at the condition of the kitchen and called the police. Upon arrival the police officers went to the second floor of the building, where the defendant lived with his family consisting of himself, a child five years of age and the maid.

From the facts it appears that the defendant while examining a rifle owned by him to learn whether or not it was loaded, accidentally discharged the bullet therefrom, which penetrated the floor of the kitchen and passed through the ceiling of the first floor in a diagonal direction and entered a side wall; that the police who were called appeared at the back door of defendant's apartment and knocked for the purpose of gaining admittance. Shots were fired, but the evidence is in dispute as to just how or by whom.

Walter Garrison, one of the police officers, testified that when he appeared at the back door on the second floor for the first time and knocked, there was no response; that he returned to the first floor and examined the kitchen, the room in which it is claimed the shot was fired from the rifle in the hands of the defendant, penetrating the ceiling and striking the wall. After completing his examination he returned to the second floor and rapped on the back door and said, "We are police officers." In reply he heard "Get away from there," and the witness said, "We want to talk to you," and heard the answer, "Get away if you know what is good for you." Then the witness testified he heard someone say, "Leave them in," and the police officer said, "What is the matter with you? Leave us in. We are police officers. We want to talk to you;" that a woman answered and 5 shots were fired through the door, but did not strike any of the officers.

In response to a call from these officers, five or six more squad cars came, and the officers then broke into the apartment and threw in tear bombs, and finally entered and arrested Anton Mrozek,

he came and looked at the condition of the kitchen and called the police. Upon arrival the police officers went to the second floor of the building, where the defendant lived with his family consisting of himself, a child five years of age and the maid.

From the facts it appears that the defendant while examining a rifle owned by him to learn whether or not it was loaded, accidentally discharged the bullet therefrom, which penetrated the floor of the kitchen and passed through the ceiling of the first floor in a diagonal direction and entered a side wall; that the police who were called appeared at the back door of defendant's apartment and knocked for the purpose of gaining admittance. Shots were fired, but the evidence is in dispute as to just how or by whom.

After Garrison, one of the police officers, testified that when he appeared at the back door on the second floor for the first time and knocked, there was no response; that he returned to the first floor and examined the kitchen, the room in which it is claimed the shot was fired from the rifle in the hands of the defendant, penetrating the ceiling and striking the wall. After completing his examination he returned to the second floor and repeated on the back door and said, "We are police officers." In reply he heard "Get away from there," and the witness said, "I want to talk to you," and heard the answer, "Get away if you know what is good for you." Then the witness testified he heard someone say, "Leave them alone," and the police officer said, "What is the matter with you? Leave us alone. We are police officers. We want to talk to you;" that a woman answered and 5 shots were fired through the door, but did not strike any of the officers.

In response to a call from these officers, five or six more squad cars came, and the officers then broke into the apartment and threw in tear bombs, and finally entered and arrested John Brown.

who was visiting the defendant at the time. They also arrested the maid and the defendant, and from the record it appears that both the defendant and his friend Mrozek were assaulted by the police, and that the defendant was taken to the Bridewell Hospital, where he was given first aid for the injuries he received when assaulted by the police after he was arrested.

On the witness stand the defendant stated, which does not seem to be contradicted, that when he heard the knocking on the back door he said he could not open the door, for them to come around to the front door so he could see who they were; that the reason for this was at one time some men called at his home where he previously resided and stated they were police officers and wanted to see something; that he was away, but the maid, Rose Kuklewicz, was there; that he made a report of this occurrence to the 29th Police District, and also reported the license number of the car in front of his house, and he was informed by the police that the car had been stolen; that he refused to admit them because of this experience, and because he was not sure they were police officers, and asked them to step around to the front of the building so he could see them. During the conversation an attempt was made by the police to enter defendant's premises. They admitted they had no warrant for anyone occupying the premises and that they had no knowledge a felony had been committed.

There is evidence tending to show shots were fired from the back of the house into defendant's premises; that the maid fired three shots from this small revolver and was stopped by the defendant, who told her not to shoot, for the men might be police officers; that it was thereafter the tear gas was thrown into the premises by the police and the defendant was arrested.

These are substantially the facts as they appear in the record.

The question arises was the jury justified in finding

who was visiting the defendant at the time. They also arrested the maid and the defendant, and from the record it appears that both the defendant and his friend Krosak were assaulted by the police, and that the defendant was taken to the Eastman Hospital, where he was given first aid for the injuries he received when assaulted by the police after he was arrested.

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There is evidence tending to show shots were fired from the back of the house into defendant's premises; that the maid fired three shots from a small revolver and was stopped by the police; that she told her not to shoot, for the man might be police officers; that it was thereafter the fear that she threw into the premises by the police and the defendant was arrested.

These are substantially the facts as they appear in the record.

the defendant guilty, beyond a reasonable doubt, of firing these shots to inflict a bodily injury with a pistol.

The defendant calls our attention to the case of The People v. Lavac, 357 Ill. 554. In that case two police officers with a warrant for the arrest of Lavac, appeared at his home in Berwyn, and Lavac killed the two officers while they were trying to force an entrance into his home. It was conceded that Lavac fired the shots, but the contention was made that the shots were fired in the necessary, or apparently necessary, defense of himself, his family and habitation. The court said:

"Lavac testified he was not acquainted with Svec and did not know that he was a police officer. He said he was at home with his family on the evening in question preparing to take a bath; that his wife told him that someone was at the kitchen door; that he was aware that hoodlums had been active in the neighborhood and upon going to the door took his pistol in hand; that the inside kitchen door and the outside storm door were both closed; that without opening the door he made inquiry of the persons outside, and was told, in substance, to open the door or they would break in or shoot in. Thereupon he said they immediately fired through the door and he returned the fire. After the firing ceased he said he went out on the back porch, where he saw some people standing and asked that they call the police. When the police arrived Lavac was in the living room and his wife and three children were around him. When asked who did the shooting he said, 'Mans come to house and I shoot.' This was corroborated by the testimony of his daughter, Marian."

The purpose of calling our attention to this language is to point out the similarity in the cases. In the instant case the officers did not have a warrant for the arrest of the defendant, but were acting upon information that a shot had been fired, and had penetrated the ceiling of the first floor apartment, indicating that the shot was from the second floor. There was no evidence that the police had seen the defendant commit any misdemeanor or other crime. What really happened was largely a question of fact for the jury.

the defendant guilty, beyond a reasonable doubt, of firing these shots to inflict a bodily injury with a pistol.

The defendant calls our attention to the case of The People v. Hayes, 327 Ill. 554. In that case two police officers with a warrant for the arrest of Hayes, appeared at his home in Chicago, and Hayes killed the two officers while they were trying to force an entrance into his home. It was conceded that Hayes fired the shots, but the contention was made that the shots were fired in the necessity, or apparently necessary, defense of himself, his family and habitation. The court said:

"Hayes testified he was not acquainted with Hayes and did not know that he was a police officer. He said he was at home with his family on the evening in question preparing to take a bath; that his wife told him that someone was at the kitchen door; that he was aware that hoodlums had been active in the neighborhood and upon going to the door took his pistol in hand; that the inside kitchen door and the outside storm door were both closed; that without opening the door he made inquiry of the persons outside, and was told, in substance, to open the door or they would break in or shoot in. Thereupon he said they immediately fired through the door and he returned the fire. After the firing ceased he said he went out on the back porch, where he saw some people standing and said that they call the police. When the police arrived Hayes was in the living room and his wife and three children were around him. When asked who did the shooting he said, 'I came to house and I shoot.' This was corroborated by the testimony of his daughter, Marian."

The purpose of calling our attention to this language is to point out the similarity in the cases. In the instant case the officers did not have a warrant for the arrest of the defendant, but were acting upon information that a shot had been fired, and had penetrated the ceiling of the first floor apartment, indicating that the shot was from the second floor. There was no evidence that the police had seen the defendant commit any misdemeanor or other crime. What really happened was largely a question of fact for the jury.

The defendant testified he had not fired any shots, and the maid Rose Kuklewicz says she is the one who was guilty of firing the shots and that the defendant told her not to fire because the men might be police officers. The only evidence in the record tending to show the defendant fired the shots is the testimony of Anton Mrozek. However, when we come to examine the evidence of Mrozek it is apparent that at one time during the examination he made the statement in court that the defendant did not fire any shots; that he went to the front room and did not see anything. Afterwards, on cross-examination by the People, when he was asked if he did not make the statement at a certain place that the defendant fired the shot, he said, "Yes, I tried to explain."

The witness Mrozek was called as a court witness and cross-examined by both parties to the litigation. The contention is made that it was erroneous to permit the State's Attorney to question this witness as to the statement made by him in the absence of the defendant regarding what occurred at the place in question. The question is whether the statement of a witness called by the court, made in the absence of the defendant, can be used for the purpose of impeachment. The People in reply to the contention of this defendant urge upon this court that from the record it does not appear objection was made as to the right of the People to impeach a witness because of statements made by the witness contradictory to the testimony now before the court, and it would appear from an examination of the objection made by the attorney for the defendant that the objection was concerning the form of the examination from an alleged statement. The witness was interrogated as to what was said at a certain time and asked whether the statement called to his attention was made, which was proper for the purpose of impeachment, and we are satisfied that the evidence elicited by such question was competent.

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However, the real question here is whether the defendant assaulted the police officers in the manner alleged in the indictment. The maid testified that she did fire the shots, and the prosecution contends that five shots were fired. If this is so, then they were fired by the maid, for there is no evidence in the record contradicting her evidence. Whether or not the officers were justified in entering the premises in the manner alleged was a question for the jury to determine. There is no evidence other than we have indicated that the defendant fired the shots, except the testimony of Mrozek, which is not very clear.

We believe there is not sufficient evidence to establish beyond a reasonable doubt that the defendant was guilty of the charge alleged in the indictment, and for the reasons stated in this opinion the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

DENIS E. SULLIVAN, P.J. AND HALL, J. CONCUR.

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We believe there is not sufficient evidence to establish beyond a reasonable doubt that the defendant was guilty of the charge alleged in the indictment, and for the reasons stated in this opinion the judgment is reversed and the case remanded.

DAVID E. BULLIVANT, J. J. AND HALL, J. CONCUR.

38978

OLD FORT DEARBORN WINE & LIQUOR
CO., a Corporation,

(Plaintiff) Appellee,

v.

OLD DEARBORN DISTRIBUTING CO.,
a Corporation,

(Defendant) Appellant.

26 17
INTERLOCUTORY APPEAL

FROM CIRCUIT COURT

COOK COUNTY.

287 I.A. 617⁴

MR. JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT.

The defendant by its appeal seeks to reverse the order of the court granting a temporary injunction based on plaintiff's original and supplemental bills of complaint, wherein it is charged that the defendant's acts violated the provisions of the Illinois Fair Trade Act (Ill. State Bar Stat. 1935; Smith's Stat. 1935). The legality of this act was approved by the Illinois Supreme Court in the case entitled, Joseph Triner Corp. v. Carl W. McNeil, Docket No. 23475, and again in the case entitled, Seagram-Distillers Corp. v. The Old Dearborn Distributing Co., Docket No. 23531 - April, 1936.

The injunctional order restrains the defendant from directly or indirectly advertising for sale at retail, offering for sale at retail or selling at retail in the City of Chicago certain brands of whiskies distributed by the plaintiff, known as "Cream of Kentucky" and "Wilken Family Blend," below certain prices fixed by the order.

A motion was made in this court by the defendant to consolidate the instant appeal with the pending appeal in the case of Old Fort Dearborn Wine & Liquor Co., a corp. v. Old Dearborn Distributing Co., a corp. Gen. No. 38931, which motion was denied. Subsequently, upon the suggestion of plaintiff that there be a

28978

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(Plaintiff) Appellee,

v.

OLD DEARBORN DISTILLING CO., a Corporation,

(Defendant) Appellant.

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directly or indirectly advertising for sale at retail, offering for sale at retail or selling at retail in the City of Chicago certain brands of whiskies distributed by the plaintiff, known as "Cream of Kentucky" and "Wicken Family Blend," below certain prices fixed by the order.

A motion was made in this court by the defendant to

consolidate the instant appeal with the pending appeal in the case of Old Fort Dearborn Wine & Liquor Co., a corp. v. Old Dearborn Distilling Co., a corp. No. 38931, which motion was denied.

Subsequently, upon the suggestion of plaintiff that there be a

diminution of the record in this court, the motion was allowed and the plaintiff was permitted to file an additional record. The defendant suggests that this court consider certain pages of defendant's brief filed in the case of Old Fort Dearborn Wine & Liquor Co. v. Old Dearborn Distributing Co. supra. However, only the questions raised in the record, abstract and brief of the defendant filed in the pending case and properly before this court, will be considered.

Upon the questions sought to be recognized in this case we have held in Old Fort Dearborn Wine & Liquor Co. v. Old Dearborn Distributing Co., supra, that the Court's order granting a temporary injunction was a proper exercise of its jurisdiction, for the reasons stated in the opinion, and our conclusion in that case is controlling upon the questions now before us. Whether or not the court exercised proper discretion depends in each case upon the facts and circumstances before the court at the time of its finding. Therefore, it is not necessary for us to point out the difference in each of the authorities cited upon this question, for the conclusion in all of them is that when exercising its discretion in remanding or entering judgment, the court must depend upon the facts and circumstances in evidence.

In Old Fort Dearborn Wine & Liquor Co. v. Old Dearborn Distributing Co. Gen. No. 38931, we said:

"The general purpose of an injunctive order is to restrain acts which would destroy the property rights of the person or company damaged. The court has discretion under proper circumstances to enter an order to maintain the status quo between the parties until a final hearing is had. In the instant case the facts disclose that the defendant is charged under oath with taking advantage of the established good reputation of plaintiff's products known by the label used, which is a trade-mark emblem.

It is the undoubted right of a manufacturer or wholesaler to maintain a fair price for an article that has back

diminution of the record in this court, the motion was allowed and the plaintiff was permitted to file an additional record. The

defendant suggests that this court consider cert in ages of defendant's brief filed in the case of Old Fort Dearborn Line & Lighter Co. v. Old Dearborn Distributing Co., supra. However, only

the questions raised in the record, abstract and brief of the defendant filed in the pending case and properly before this court, will be considered.

Upon the questions sought to be recognized in this case we have held in Old Fort Dearborn Line & Lighter Co. v. Old Dearborn Distributing Co., supra, that the Court's order granting a temporary

injunction was a proper exercise of its jurisdiction, for the reasons stated in the opinion, and our conclusion in that case is controlling upon the questions now before us. Whether or not the court exercised proper discretion depends in each case upon the facts and circumstances before the court at the time of its finding. Therefore, it is not necessary for us to point out the difference in each of the authorities cited upon this question, for the conclusion in all of them is that when exercising its discretion in remanding or entering judgment, the court must depend upon the facts and circumstances in evidence.

In Old Fort Dearborn Line & Lighter Co. v. Old Dearborn

Distributing Co. Gen. No. 38331, we said:

"The general purpose of an injunctive order is to restrain acts which would destroy the property rights of the person or company damaged. The court has discretion under proper circumstances to enter an order to prevent the status quo between the parties until a final hearing is had. In the instant case the facts disclose that the defendant is ordered under oath with taking advantage of the established good reputation of plaintiff's products known by the label used, which is a trade-mark emblem. It is the undoubted right of a manufacturer or wholesaler to maintain a fair price for an article that has been

of it the record of good quality, and which is recognized as such by the buying public. This is brought to the attention of the purchaser by the manufacturer's label under which the article is sold. In order to attract the attention of buyers, publicity is necessary. This fact is apparent when it is to be observed on all sides that the merits of an article are extolled and the benefit that may be derived from the use of the advertised article.

The plaintiff sets forth in its bill the established record of goods sold by it, to the merits of which the public is attracted by its label. The customers are familiar with the known quality of the article so sold, and to further protect its rights the label used by the plaintiff bears the legend trade-mark; in other words, the label has been registered under the provisions of the Trade Mark Statute of the United States.

From the pleadings the plaintiff has an established and prosperous business, which is based upon the sale of the goods handled at a price agreed upon by all its agents, wholesale or retail, and by its customers; for the liquor known as 'Golden Wedding' and 'Old Quaker', as charged in this bill. There is no question but that such are bound by the several agreements, but there is the question, can the defendant be controlled by the price fixed by a manufacturer or distributor not a party to any contract. This problem is not a difficult one to decide. The Supreme Court in the Triner case makes this pertinent statement:

'Legislatures have long endeavored to promote free competition by laws aimed at trusts and monopolies such as the Anti-Trust act of this State, enacted in 1891, (Ill. State Bar. Stat. 1935, p. 1235, Smith's Stat. 1935, p. 1201.) It is manifest that when the General Assembly enacted the Fair Trade Act in 1935 it was attempting to modify its former policy and to adopt an economic concept which has received widespread popular approval in recent years. The gist of the theory is that the manufacturer of a trade-marked article sold in competition with articles of similar nature, who has designated a fair price at which he, as well as his distributor and retailer, can make a fair profit, has a property right in the good will towards his product which he has created, and that it is sound public policy to protect that property right against destruction by others who have no interest in it except to employ it in a misleading manner for the purpose of deceiving the public. "The basic theory on which this concept rests" observed the California Supreme Court in Max Factor & Co. v. Kunsman, 55 Pac. (2d.) 177", is that, from a social standpoint, price cutting, in the long run, adversely affects the public interest, and that the public will be adequately protected against excessive prices by the ordinary play of fair and honest competition between manufacturers of similar products." Section 2 of the California Fair Trade act, as does section 3 of our law, prohibits manufacturers from contracting between themselves to fix re-sale prices.'

of it the record of good quality, and which is recognized as such by the buying public. This is brought to the attention of the purchaser by the manufacturer's label under which the article is sold. In order to attract the attention of buyers, publicity is necessary. This fact is apparent when it is to be observed on all sides that the merits of an article are extolled and the benefit that may be derived from the use of the advertised article.

The plaintiff sets forth in its bill the established record of goods sold by it, to the merits of which the public is attracted by its label. The customers are familiar with the known quality of the article so sold, and to further protect its rights the label used by the plaintiff bears the legend trade-mark; in other words, the label has been registered under the provisions of the Trade Mark Statute of the United States.

From the pleadings the plaintiff has an established and prosperous business, which is based upon the sale of the goods handled at a price agreed upon by all its agents, wholesale or retail, and by its customers, for the liquor known as 'Golden Siding' and 'Old Quaker', as charged in this bill. There is no question but that such are bound by the several agreements, but there is the question, can the defendant be controlled by the price fixed by a manufacturer or distributor not a party to any contract. This problem is not a difficult one to decide. The Supreme Court in the *River case* makes this pertinent statement: 'Legislatures have long endeavored to protect free competition by laws aimed at trusts and monopolies such as the Anti-Trust act of this State, enacted in 1881' (111) State Bar. Stat. 1935, p. 1335, Smith's Stat. 1935, p. 1301. It is manifest that when the General Assembly enacted the Fair Trade act in 1935 it was attempting to modify its former policy and to adopt an economic concept which has received widespread popular approval in recent years. The gist of the theory is that the manufacturer of a trade-marked article sold in competition with articles of similar nature, who has designated a fair price at which he as well as his distributor and retailer, can make a fair profit, has a property right in the good will towards his product which he has created, and that it is sound public policy to protect that property right against destruction by others who have no interest in it except to employ it in a misleading manner for the purpose of deceiving the public. 'The basic theory on which this concept rests' observed the California Supreme Court in *Max Factor & Co., v. Lussan*, 55 Pac. (2d) 177, is that from a social standpoint, price cutting, in the long run, adversely affects the public interest, and that the public will be seriously protected and that excessive prices by the ordinary play of fair and honest competition between manufacturers of similar products.' Section 3 of the California Fair Trade act, as amended, of our law, prohibits manufacturers from contracting between themselves to fix re-sale prices.

The facts that appear from the allegations of the bill of complaint justified the court's order for a temporary injunction so that the status quo be maintained between the parties until a final hearing to determine the merits of the controversy.

The conclusion reached by this court is based solely upon the facts as alleged in the bill of complaint, and the application of the law to the facts as herein indicated is not to be taken as an expression of the court upon the merits. The conclusion of the trial court can be reached only upon a final hearing."

From an examination of this case it is evident that the questions now sought to be argued have been disposed of in the case entitled, Old Fort Dearborn Wine & Liquor Co. v. Old Dearborn Distributing Co. supra. Therefore further discussion of the facts as recited in the bill and supplemental bill of complaint is not necessary.

There is however another question to be considered in the instant case, and that is, did the court err in denying defendant's petition for the removal of the case to the United States District Court for the Northern District of Illinois, Eastern Division

The petition represents to the court, substantially, that the pending suit is a suit of a civil nature in equity, being a suit for an injunction arising under the Constitution and Laws of the United States and involving a Federal question in that it is a proceeding brought to restrain and enjoin the defendant from charging certain prices for articles of merchandise in trade and commerce in interstate commerce in which the said defendant is engaged and further involving an attempt on the part of the plaintiff to compel the defendant to enter into a combination or agreement for the fixing of prices of its interstate trade and commerce in violation of the Sherman Anti-Trust Act, Title 15, Section 1, United States Statutes at Large, Vol. 44, Part 1, and further involving defendant's rights under the fifth and fourteenth amendments to the constitution of the United States of America, where-

The facts that appear from the allegations of the bill of complaint justified the court's order for a temporary injunction so that the status quo be maintained between the parties until a final hearing to determine the merits of the controversy. The conclusion reached by this court is based solely upon the facts as alleged in the bill of complaint, and upon the application of the law to the facts as herein indicated is not to be taken as an expression of the court upon the merits. The conclusion of the trial court can be reached only upon a final hearing."

From an examination of this case it is evident that the questions now sought to be argued have been disposed of in the case entitled, Old Fort Dearborn Line & Motor Co., v. Old Dearborn Distributing Co., supra. Therefore further discussion of the facts as recited in the bill and supplemental bill of complaint is not necessary.

There is however another question to be considered in the instant case, and that is, did the court err in denying defendant's petition for the removal of the case to the United States District Court for the Northern District of Illinois, Eastern Division. The petition represents to the court, substantively, that the pending suit is a suit of a civil nature in equity, being a suit for an injunction arising under the Constitution and laws of the United States and involving a Federal question in that it is a proceeding brought to restrain and enjoin the defendant from charging certain prices for articles of merchandise in trade and commerce in interstate commerce in which the said defendant is engaged and further involving an attempt on the part of the plaintiff to compel the defendant to enter into a combination or agreement for the fixing of prices of its interstate trade and commerce in violation of the Sherman Anti-Trust Act, Title 18, Section 1, United States Statutes at Large, Vol. 44, Part 1, and further involving defendant's rights under the fifth and fourteenth amendments to the constitution of the United States of America, where-

under jurisdiction is invested in the United States District Court for the Northern District of Illinois, Eastern Division, and the matter in controversy exceeds exclusive of interest and costs the sum and value of \$3,000, and that the United States District Court, Northern District of Illinois, Eastern Division, has original jurisdiction of such an action.

At the time the petition was presented the petitioner tendered its bond, as provided by statute, in the sum of \$500.

It is to be noted that soon after the enactment of the Judiciary Act of 1875, it was established that whether the defendant relied on a right given by federal laws was to be determined solely from the face of the pleadings in the cause and that allegations by the person seeking a removal characterizing other pleadings as involving a federal question, would be disregarded. In the case of Tennessee v. Union & Planters' Bank, 152 U. S. 454, the rule is stated and the court quotes from New Jersey Central R. R. Co. v. Mills, 113 U. S. 249, as follows:

"The question whether a party claims a right under the constitution or laws of the United States, is to be ascertained by the legal construction of its own allegations and not by the effect attributed to those allegations by the adverse party.

From the record it appears that at the time of the hearing of the application for the removal of the cause to the United States District Court, the defendant attempted to offer evidence, the purpose being, so it is claimed, to prove that the whiskey bearing the trade-mark, brand or name, "Cream of Kentucky" and "Wilken Family Blend", involved in the supplemental complaint, was purchased in Kentucky, shipped to Chicago in the latter part of April and was being sold in original packages, and that, therefore, the subject-matter of the supplemental complaint involved interstate commerce, and consequently the cause was removable to the United

under jurisdiction is invested in the United States District Court for the Northern District of Illinois, Eastern Division, and the matter in controversy exceeds exclusive of interest and costs the sum and value of \$,000, and that the United States District Court, Northern District of Illinois, Eastern Division, has original jurisdiction of such an action.

At the time the petition was presented the petitioner tendered its bond, as provided by statute, in the sum of \$500. It is to be noted that soon after the enactment of the Judiciary Act of 1875, it was established that whether the defendant relied on a right given by federal laws was to be determined solely from the face of the pleadings in the cause and that allegations by the person seeking a removal characterizing other pleadings as involving a federal question, would be disregarded. In the case of Tennessee v. Union & Planters' Bank, 153 U. S. 454, the rule is stated and the court quotes from New Jersey Central R. Co. v. Miles, 113 U. S. 348, as follows:

"The question whether a party claims a right under the constitution or laws of the United States, is to be ascertained by the legal construction of its own allegations and not by the effect attributed to those allegations by the adverse party."

From the record it appears that at the time of the hearing of the application for the removal of the cause to the United States District Court, the defendant attempted to offer evidence, the purpose being, as it is claimed, to prove that the whiskey bearing the trade-mark, brand or name, "Green of Kentucky" and "Aiken Family Blend", involved in the supplemental complaint, was purchased in Kentucky, shipped to Chicago in the latter part of April and was being sold in original packages, and that, therefore, the subject-matter of the supplemental complaint involved interstate commerce, and consequently the cause was removable to the United

States District Court. Upon presentation of the offer of this evidence, the plaintiff made objection, and the court denied the offer.

The plaintiff contends that the cause was not automatically removed by the filing of removal petition and bond, but it was the duty of the Circuit Court of Cook County to determine judicially whether the cause was removable and to retain jurisdiction if it was not.

Among the cases called to our attention is that of Madisonville Traction Co. v. Saint Bernard Mining Co., 196 U. S. 239, where the court said:

"It is well settled that if upon the face of the record, including the petition for removal, a suit does not appear to be a removable one, then the state court is not bound to surrender its jurisdiction, and may proceed as if no application for removal had been made."

and quotes from the case of Stone v. South Carolina, 117 U. S. 430, the following:

"The mere filing of a petition for the removal of a suit, which is not removable, does not work a transfer. To accomplish this the suit must be one that may be removed, and the petition must show a right in the petitioner to demand the removal."

And so the question is whether from the pleadings and the facts set forth interstate commerce is involved.

It is not proper practice in this State upon the hearing of a motion for a temporary injunction, where the defendant has not filed an answer either to the original or to the supplemental complaint, to consider evidence upon such motion. The court will consider the facts as set forth in the bill of complaint if properly verified, and may in its discretion grant an injunctive order.

Dunne v. County of Rock Island, 273 Ill. 53. Therefore, under the rule as laid down in the Dunne case this court on an appeal from an interlocutory injunction, where the record fails to show that any answer was filed by the defendant, will not consider evidence offered

States District Court. Upon presentation of the offer of this evidence, the plaintiff made objection, and the court denied the offer. The plaintiff contends that the cause was not automatically removed by the filing of removal petition and bond, but it was the duty of the District Court of Cook County to determine judicially whether the cause was removable and to retain jurisdiction if it was not.

Among the cases called to our attention is that of Madisonville Traction Co. v. Saint Bernard Mining Co., 198 U. S. 339, where the court said:

"It is well settled that if upon the face of the record, including the petition for removal, a suit does not appear to be a removable one, then the state court is not bound to surrender its jurisdiction, and may proceed as if no application for removal had been made."

and quotes from the case of Stone v. South Carolina, 117 U. S. 430, the following:

"The mere filing of a petition for the removal of a suit, which is not removable, does not work a transfer. To accomplish this the suit must be one that may be removed, and the petition must show a right in the petitioner to demand the removal."

And so the question is whether from the pleadings and the facts set forth interest to commerce is involved.

It is not proper practice in this State upon the hearing of a motion for a temporary injunction, where the defendant has not filed an answer either to the original or to the supplemental complaint, to consider the facts as set forth in the bill of complaint if properly verified, and may in its discretion grant an injunctive order. Dunne v. County of Cook Island, 273 Ill. 52. Therefore, under the rule as laid down in the Dunne case this court on an appeal from an interlocutory injunction, where the record fails to show that an answer was filed by the defendant, will not consider evidence offered

by the defendant in opposition to the issuance of the injunction.

From the evidence offered upon the petition for removal, it appears that the transaction did not occur in any state other than Illinois.

From this offer of evidence to sustain defendant's petition for removal, it appears that the defendant purchased 18 cases of "Cream of Kentucky" and "Wilken Family Blend" whiskey in Louisville, Kentucky, and that the cases were shipped to Chicago for the purpose of selling these whiskies at retail in Chicago. This therefore did not constitute the carrying on of interstate commerce. The whiskey which was shipped to the defendant had reached its destination in the State of Illinois, and was here to be sold to individuals in this State making such purchases. The Supreme Court of Illinois, in passing upon the question of interstate commerce in a somewhat similar case, namely, The People v. Gross Co. 361 Ill. 405, Justice Wilson speaking for the court, said:

"Whether a series of acts in a given case constitutes the carrying on of interstate commerce is to be determined by what is actually done. * * * Merchandise which has been unloaded and stored ceases to be a subject of interstate commerce and loses its immunity from State taxation or regulation. (Nashville, Chattanooga and St. Louis Railway Co. v. Wallace, 288 U. S. 249, 266; Gregg Dyeing Co. v. Query, 286 id. 472; Hart Refineries v. Harmon, 278 id. 499; Susquehanna Coal Co. v. Mayor of South Amboy, 228 id. 665; Bacon v. Illinois, 277 id. 504, 516, 517; General Oil Co. v. Grain, 209 id. 211; Kehrer v. Steward, 197 id. 60; Minnesota v. Blasius, *supra*.) Where the business, in its essential national aspect, has come to an end and the condition existing or the acts under consideration performed are local, they are not subject to regulation by the Federal government. (Schechter Poultry Corp. v. United States, 79 U. S. (L.ed.) 888,) but they are subject to regulation by the State. * * * It (the produce) had been withdrawn from the carriers and was not in transit. It had a situs in this State and no other destination was in the contemplation of the shippers. * * * Under these circumstances it is immaterial whether the produce remains in the original packages of the shipper or whether there has been an actual transfer by sale."

It is to be noted from the opinion of the Supreme Court that the case of Swift & Co. v. United States, 196 U. S. 375, relied on by the defendant, was distinguished by Justice Wilson on the ground that the goods in the Swift case had not reached their final destination.

From the facts as they appear and to which we have already referred, the court properly denied the petition for removal to the United States District Court for the Northern District of Illinois, Eastern Division, for as stated in this opinion, they would indicate that the liquor was purchased by the defendant with the intention of offering it for sale in Chicago, Illinois, after it had reached its destination and been unloaded in Chicago, Illinois.

We are unable to say from the facts that the court erred in denying the motion for removal.

After a careful consideration of the facts in this case, we believe that the court in entering the temporary injunction to maintain the status quo until a final hearing be had upon the merits, was well within its discretion. Therefore the order is affirmed.

ORDER AFFIRMED.

DENIS E. SULLIVAN, P.J. AND HALL, J. CONCUR.

It is to be noted from the opinion of the Supreme Court that the case of Swift & Co. v. United States, 198 U. S. 375, relied on by the defendant, was distinguished by Justice Wilson on the ground that the goods in the Swift case had not reached their final destination.

From the facts as they appear and to which we have already referred, the court properly denied the petition for removal to the United States District Court for the Northern District of Illinois, Eastern Division, for as stated in this opinion, they would indicate that the liquor was purchased by the defendant with the intention of offering it for sale in Chicago, Illinois, after it had reached its destination and been unloaded in Chicago, Illinois.

We are unable to say from the facts that the court erred in denying the motion for removal.

After a careful consideration of the facts in this case, we believe that the court in entering the temporary injunction to maintain the status quo until a final hearing be had upon the writs, was well within its discretion. Therefore the order is affirmed.

ORDER AFFIRMED.

DENIS E. BURRILL, P. J. AND HALL, J. CONCUR.

38087

GEORGE G. COBEAN,

Appellant.

v.

GUY A. RICHARDSON and WALTER J. CUMMINGS,
as receivers of Chicago Railways Company,
a corporation, HARVEY B. FLEMING and
EDWARD E. BROWN, as receivers of Chicago
City Railway Company, Calumet & South
Chicago Railway Company and The Southern
Street Railway Company, corporations,
doing business as CHICAGO SURFACE LINES,
and J. FRED BUTLER,

Appellees.

APPEAL FROM
SUPERIOR COURT,
COOK COUNTY.

287 I.A. 618¹

MR. PRESIDING JUSTICE SULLIVAN
DELIVERED THE OPINION OF THE COURT.

This appeal seeks to reverse a judgment in favor of defendants Butler and the receivers of the Chicago Surface Lines entered upon the verdict of a jury finding both Butler and such receivers not guilty in an action for damages for personal injuries alleged to have been suffered by plaintiff in a collision between one of the receivers' street cars and Butler's automobile, in which plaintiff was riding as a guest. The declaration, filed prior to January 1, 1934, charged the receivers with both negligence and willful and wanton conduct in the operation of the street car and Butler with willful and wanton conduct in the operation of his automobile, his liability being limited under the Guest act (Cahill's 1931 Ill. Rev. Stats., ch. 95a, subsec. b, sec. 42, par. 43) to such conduct.

Plaintiff contends (1) that the verdict was against the manifest weight of the evidence; (2) that the trial court admitted

GEORGE G. COBBAN,

Appellant.

v.

JOY A. RICHMOND and WILLIAM J. RICHMOND,
as receivers of Chicago Railway Company,
a corporation, HARRY H. RICHMOND and
ROBERT L. RICHMOND, as receivers of Chicago
City Railway Company, Chicago & South
Chicago Railway Company and the Southern
Chicago Railway Company, corporations,
doing business as CHICAGO RAILWAY LINE,
and J. HENRY BUTLER,
Appellees.

MR. JUSTICE BULLIVANT

DELIVERED THE OPINION OF THE COURT.

This appeal seeks to reverse a judgment in favor of

defendants Butler and the receivers of the Chicago Railway Line

entered upon the verdict of a jury finding both Butler and each

receivers not guilty in an action for damages for personal injuries

alleged to have been suffered by plaintiff in a collision between

one of the receivers' street cars and Butler's automobile, in

which plaintiff was riding as a guest. The decision, filed

prior to January 1, 1934, charged the receivers with contributory

negligence and withheld and without contact in the operation of the

street car and Butler with willful and wanton conduct in the

operation of his automobile, his liability being limited under

the guest act (Smith's 1931 Ill. Rev. Stat., ch. 124, § 100, supra).

Sec. 42, par. 43) to such conduct.

Plaintiff contends (1) that the verdict was against the

manifest weight of the evidence; (2) that the trial court erred in

287 I.A. 618

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

improper evidence at the trial; and (3) that prejudicial error was committed by the court in many of the instructions given to the jury. We deem it necessary to consider only the second of these contentions.

There was a sharp conflict in the evidence as to the facts and circumstances surrounding the occurrence out of which this action arose and as to the question of the liability of either Butler or the receivers or of both the receivers and Butler, and it was important and necessary that the rulings of the trial court on evidence should have been substantially correct and virtually free from error. (Sertant v. Crane Co., 142 Ill. App. 49; Carlin v. Chicago Ry. Co., 205 Ill. App. 303.)

Plaintiff testified and it was undisputed that he was the managing vice president of the Butler Paper Company (Chicago division) at a salary of \$25,000 a year at the time he was injured in the collision; that he suffered no loss of salary for the time he was absent from and unable to perform his business duties by reason of his injuries; that he had invited defendant Butler and two other friends to play golf with him on the day in question at the Westmoreland Country Club, of which he was a member; and that in turn he was invited by defendant Butler to ride as his guest in his automobile from the place of business of the Butler Paper Company on West Monroe street, Chicago, to the country club, near Evanston.

It also appeared that Butler paid plaintiff's hospital and doctor bills, but Cobean acknowledged his obligation to reimburse Butler for same. Cobean, himself, paid a substantial sum for nursing services. Notwithstanding that plaintiff received his salary in full during the period that his injuries necessitated his absence from his business and that Butler in the first instance paid his hospital and doctor bills, Cobean was clearly entitled to

improper evidence at the trial; and (3) that prejudicial error was committed by the court in many of the instructions given to the jury. We deem it necessary to consider only the second of these contentions.

There was a sharp conflict in the evidence as to the facts and circumstances surrounding the occurrence out of which this action arose and as to the question of the liability of either Butler or the receivers or of both the receivers and Butler, and it was important and necessary that the rulings of the trial court on evidence should have been substantially correct and virtually free from error. (Garrett v. State Co., 142 Ill. App. 40; Callin v. Chicago Ry. Co., 208 Ill. App. 303.) Plaintiff testified and it was undisputed that he was the

managing vice president of the Butler Paper Company (Chicago division) at a salary of \$25,000 a year at the time he was injured in the collision; that he suffered no loss of salary for the time he was absent from and unable to perform his business duties by reason of his injuries; that he had invited defendant Butler and two other friends to play golf with him on the day in question at the Westmoreland Country Club, of which he was a member; and that in turn he was invited by defendant Butler to ride on his motor in his automobile from the place of business of the Butler Paper Company on West Monroe street, Chicago, to the country club, near Evanston.

It also appeared that Butler paid Plaintiff's hospital and doctor bills, but Coburn acknowledged his obligation to reimburse Butler for same. Coburn, himself, paid a substantial sum for running expenses. Notwithstanding that Plaintiff received his salary in full during the period that his injuries necessitated his absence from his business and that Butler in the first instance paid his hospital and doctor bills, Coburn was clearly entitled to

recover in this common law action for any permanent injuries he may have received, his pain and suffering and expenses necessarily incurred in being cured of his injuries if the liability of the receivers or Butler or of both was sufficiently established.

Under the settled law of this state the provisions of the Workmen's Compensation act are clearly inapplicable to plaintiff or the injuries received by him, and neither in the cross-examination of plaintiff nor in the presentation of their own evidence did the receivers attempt to show that the relationship of Cobean to the company of which he was the managing officer or the circumstances attendant upon his injury brought him under that act. Yet, counsel for the receivers was permitted by his interrogation of Butler on cross-examination and statements made by him in the presence of the jury, notwithstanding plaintiff's repeated objections, to inject into the case the Workmen's Compensation act, with the obvious purpose of creating in the minds of the jurors the impression that Cobean's only recourse was under that act and that he had already been fully compensated for his injuries.

A clearer understanding of what actually occurred during the cross-examination of Butler by counsel for the receivers is afforded by the following:

"Q. How long was Mr. Cobean away from his place of employment following this accident, Mr. Butler?

A. Well, some weeks. Of course, I have heard the testimony and what he said, and I would say about three months.

Q. And his salary was paid by the Butler Paper Company all the time that he was away from his employment as the result of this accident, was it not?

A. Yes. Yes.

* * *

Q. Mr. Butler, you say that Mr. Cobean had charge of sales in Chicago for his company, is that correct, he had general supervision and had sales, did you?

A. No, I did not.

Q. Will you please tell us again what work he did?

A. I said he was managing vice president of the J. W. Butler Company, Chicago division. They have several divisions.

Q. Chicago division?

A. Chicago division.

Q. Then he had charge of sales and everything too with it,

recover in this common law action for any permanent injuries he may have received, his pain and suffering and expenses necessarily incurred in being cured of his injuries is the liability of the receivers of Butler or of both was sufficiently established.

Under the settled law of this state the provisions of the Workmen's Compensation act are clearly inapplicable to plaintiff or the injuries received by him, and neither in the cross-examination of plaintiff nor in the presentation of their own evidence did the receivers attempt to show that the relationship of Gobson to the company of which he was the managing officer on the circumstances attendant upon his injury brought him under that act. Yet, counsel for the receivers was permitted by his interrogation of Butler on cross-examination and statements made by him in the presence of the jury, notwithstanding plaintiff's repeated objections, to inject into the case the Workmen's Compensation act, with the obvious purpose of creating in the minds of the jurors the impression that Gobson's only recourse was under that act and that he had already been fully compensated for his injuries.

A clearer understanding of what actually occurred during the cross-examination of Butler by counsel for the receivers is afforded by the following:

Q. How long was Mr. Gobson away from his place of employment following this accident, Mr. Butler?

A. Well, some weeks. Of course, I have heard the testimony and what he said, and I would say about three months.

Q. And his salary was paid by the Butler Paper Company all the time that he was away from his employment as the result of this accident, was it not?

A. Yes. Yes.

Q. Mr. Butler, you say that Mr. Gobson had charge of sales in Chicago for his company, is that correct, he had general supervision and had sales, did you?

A. No, I did not.

Q. Will you please tell us again what work he did?

A. I said he was managing vice president of the J. C. Butler Company, Chicago division. They have several divisions.

Q. Chicago division?

A. Chicago division.

Q. Then he had charge of sales and everything too with it?

-4-
is that right?

A. He was the supreme authority under the president and its board of directors.

* * *

Q. He was going out there to see some salesman?

A. No.

Q. I thought you said that he was going out there to meet some salesman and a printer?

A. No, I didn't say that.

Q. Was he going to meet any salesman out there?

A. He was going out to meet one of our salesman and a printer. Not salesman, not salesmen. You put it in the plural. Not salesmen.

Q. A salesman?

A. One of our own salesman and a printer.

Q. And was that salesman in his division?

A. Yes.

Q. And was the printer a customer of the firm?

A. Now, just a minute. You asked if the salesman was his division. I think that salesman was a salesman who worked --

Mr. Walker: If the Court please, I don't see the materiality of it. I must object to it.

Mr. Robinson: We will find out.

Mr. Walker: I don't see the materiality of it. I must object to it.

The Court: He may answer.

The Witness: What did you object to, Mr. Walker?

Mr. Walker: The Court has overruled me. He thinks you can answer.

The Court: Q. Do you have in mind the question?

A. Yes, if that salesman was a salesman of that division.

The Court: Q. If you know, tell us?

A. Now that you are asking me in that particular fashion, he was a salesman I believe of the Chicago division. I don't mean the Chicago division but the Butler Paper Corporation, which cooperates with the sales department of the Chicago division.

Mr. Robinson: Q. Then he was a man under Mr. Cobean, is that correct?

A. No. No. No.

Q. One of the men who does business with Mr. Cobean?

A. Yes.

Q. All right. Now, the printer that you speak of that you were going out to see, was he a customer of the firm?

A. Yes.

Mr. Walker: I suppose I could have my objection stand to all of this, your Honor. I don't see the materiality of it in this case.

The Court: He may answer that.

Mr. Walker: I don't want to object all the time. It may be considered as a general objection?

The Court: You had better do so.

Mr. Robinson: Q. Was he going out to promote the business of the Butler Paper Company in any way?

Mr. Walker: I object to that.

The Court: He may answer that.

A. I certainly hope so.

Mr. Robinson: Q. It was one of the purposes of having the golf game, is that correct?

A. Not necessarily.

Q. Well, was it one of the purposes?

A. Yes.

Q. And you were also going out to play golf and to --

A. Add dignity to the party."

A. Add directly to the party."
Q. And you were also going out to play golf and to --
A. Yes.
Q. Well, was it one of the purposes?
A. I certainly hope so.
The Court: He may answer that.
Mr. Walker: I don't want to object at this time. It may be considered as a general objection?
The Court: You had better to do.
Mr. Robinson: Q. As he goes out to promote the business of the Reflex Paper Company in any way?
Mr. Walker: I object to that.
The Court: He may answer that.
A. I certainly hope so.
Mr. Robinson: Q. It was one of the purposes of having the golf game, is that correct?
A. Not necessarily.
Q. Well, was it one of the purposes?
A. Yes.
Q. And you were also going out to play golf and to --
A. Add directly to the party."
Mr. Robinson: I don't see the materiality of it in all of this, your Honor. I suppose I could have my objection stand to you are going out to see, was he a customer of the firm?
Q. All right. Now, the printer that you speak of that A. Yes.
Q. One of the men who does business with Mr. Robinson?
A. No. No.
Correct?
Mr. Robinson: Q. Then he was a man named Mr. Coburn, is that with the sales department of the Chicago division.
the Chicago division but the Reflex Paper Corporation, which cooperates he was a salesman I believe of the Chicago division. I don't mean A. Now that you are asking me in that particular position, The Court: Q. If you know, tell me?
A. Yes, in that salesman was a salesman of that division.
The Court: Q. Do you have in mind the question?
Mr. Walker: The Court has overruled me. He thinks you The witness: That did you object to, Mr. Walker?
The Court: He may answer.
Object to it.
Mr. Walker: I don't see the materiality of it. I must of it. I must object to it.
Mr. Robinson: I will stand out.
Mr. Walker: If the Court please, I don't see the materiality of it. I think that salesman was a salesman who worked -- A. Now, just a minute. You asked if the salesman was his division. I was the printer a customer of the firm?
A. Yes.
Q. And was that salesman in his division?
A. One of our own salesman and a printer.
Q. A salesman?
Not salesman.
Printer. Not salesman, not a salesman. You put it in the firm. A. He was going out to meet one of our salesman and a Q. Was he going to meet any salesman out there?
A. No, I didn't say that.
Q. I thought you said that he was going out there to meet some salesman and a printer?
Q. I thought you said that he was going out there to see some salesman?
A. No. No.
A. In was the salesman actually under the present and is that right?

At the conclusion of Butler's cross-examination by attorney Walker for plaintiff, which was confined exclusively to matters concerning the collision, with the exception of the witness's statement that he was on the way, at the time and place in question, to play golf with Cobean and the others for "my pleasure," the following took place on the recross-examination of Butler by Mr. Robinson, representing the receivers:

"Q. The J. W. Butler Paper Company, is that the company for which Mr. Cobean was working?

A. He was working for one of the divisions of the J. W. Butler Paper Company. The J. W. Butler Paper Company is a holding company.

Q. Well, what company was he working for?

A. Chicago division.

Q. What is the corporate title of it?

A. J. W. Butler Paper Company.

Q. J. W. Butler Paper Company. Now, the J. W. Butler Paper Company, did they manufacture paper?

A. No.

Mr. Brown: Just a minute. That is objected to, if the Court please, as immaterial, irrelevant --

Mr. Walker: I made the same objection yesterday, your Honor.

Mr. Robinson: Q. Did they store paper?

Mr. Walker: Of course, I appreciate what Counsel is trying to prove here. It is entirely incompetent.

Mr. Robinson: No, it is not incompetent.

The Court: He is interested in what they are doing because you tried to prove some connection with them.

Mr. Robinson: This gentleman, Mr. Cobean, was working for that company.

The Court: All right.

Mr. Robinson: Q. Now, I want - you say you left 223 Monroe street, is that correct?

A. What is that?

Q. What was the number of the place of business that you left that morning in your automobile?

A. 223 to 225 East Monroe.

Q. Is the Butler Company - that is their place of business as far as Monroe street is concerned, is that correct?

A. Yes.

Q. Do they store paper there?

A. Yes.

Mr. Walker: That is objected to. Just a minute. I move to strike.

The Court: I don't see how it is material.

Mr. Walker: I suppose they think this man was an employee.

The Witness: They don't pay my bills, though.

Mr. Walker: I suppose they think he was under the Compensation act. It is entirely incompetent, your Honor. There is no plea.

Mr. Robinson: There doesn't have to be any plea. It is raised under the general issue.

Mr. Walker: Very well.

Mr. Robinson: The fact that this man at the time of the occurrence was working for the J. W. Butler Paper Company, and as

At the conclusion of Butler's cross-examination by attorney Walker for plaintiff, which was confined exclusively to matters concerning the collision, with the exception of the witness's statement that he was on the way, at the time and place in question, to play golf with Coburn and the others for "my pleasure," the following took place on the re-examination of Butler by Mr. Robinson, representing the receivers:

"Q. The J. W. Butler Paper Company, is that the company for which Mr. Coburn was working?
A. He was working for one of the divisions of the J. W. Butler Paper Company. The J. W. Butler Paper Company is a holding company.
Q. All, what company was he working for?
A. Chicago division.
Q. What is the corporate title of it?
A. J. W. Butler Paper Company.
Q. J. W. Butler Paper Company. Now, the J. W. Butler Paper Company, did they manufacture paper?
A. No.
Mr. Brown: Just a minute. That is objected to, if the Court please, as immaterial, irrelevant --
Mr. Walker: I made the same objection yesterday, your Honor.
Mr. Robinson: Q. Did they store paper?
Mr. Walker: Of course, I appreciate what Counsel is trying to prove here. It is entirely irrelevant.
Mr. Robinson: No, it is not irrelevant.
The Court: He is interested in what they are doing because you tried to prove some connection with them.
Mr. Robinson: This gentleman, Mr. Coburn, was working for that company.
The Court: All right.
Mr. Robinson: Q. Now, I want - you say you left 223 Monroe Street, is that correct?
A. That is that?
Q. What was the number of the place of business that you left that morning in your automobile?
A. 223 to 225 West Monroe.
Q. Is the Butler Company - that is their place of business as far as Monroe Street is concerned, is that correct?
A. Yes.
Q. Do they store paper there?
A. Yes.
Mr. Walker: That is objected to. Just a minute. I leave to strike.
The Court: I don't see how it is material.
Mr. Walker: I suppose they think this man was an employee.
The Witness: They don't pay my bill, that is.
Mr. Walker: I suppose they think he was under the Corporation's bill. It is entirely immaterial, your Honor. There is no place. It is raised under the General issue.
Mr. Robinson: Very well.
Mr. Robinson: The fact that this man at the time of the occurrence was working for the J. W. Butler Paper Company, and as

counsel has pointed out, he came under the Compensation act.

Mr. Walker: It isn't cross-examination at all, your Honor. It is incompetent.

Mr. Robinson: Brought out on direct.

Mr. Walker: No, it wasn't. He didn't put him on the stand.

Mr. Brown asked him nothing about it at all.

Mr. Brown: Yes, I did ask him about it.

Mr. Walker: He wasn't under, but I don't want to take an hour to prove it here, your Honor. I object to it.

The Court: All right, we will inquire about it now.

Mr. Robinson: Q. Were there elevators in that building?

Mr. Walker: The same objection.

The Court: He may answer.

Mr. Walker: I don't want to object all the time.

The Court: All right.

A. What kind of elevators?

Mr. Robinson: A. And how many stories high?

A. What kind of elevators?

Q. Any kind. Were there freight elevators and passenger elevators?

A. Yes, and merchandise elevators.

Q. And paper was stored there, is that right?

A. Yes.

Q. Was there any machinery for cutting paper there?

A. Yes.

Q. Was that run by electricity, motors?

A. Yes.

Q. And the cutting is done with some kind of a knife, or blade, is that correct, of machinery?

A. Yes.

Mr. Walker: I move to strike all testimony out relating to the Butler Paper Company having some elevators in their building and it happens to be a warehouse over there. I move to strike it all out, your Honor. It is utterly incompetent.

Mr. Robinson: Of course it isn't incompetent. It shows the relation --

Mr. Walker: And also not cross-examination here.

Mr. Robinson: The business he was engaged in, his employer was engaged in.

Mr. Walker: He is going to make a game of golf employment, I suppose.

The Court: He is not suing an employer.

Mr. Robinson: What?

The Court: He is not suing an employer.

Mr. Robinson: Judge, here is the purpose. There is evidence here now that they were going out to play golf with a customer of the Butler Paper Company. Now, if this accident arose in the course of his employment, that company is liable under the Compensation Act and no common law suit can apply.

Mr. Walker: Where is there any evidence here he was going out for business.

Mr. Robinson: You heard that from Mr. Butler himself.

Mr. Brown: And from Mr. Cobean, also.

Mr. Robinson: Section 29. We will discuss that later."

There was not even the slightest implication in this case that the golf game in which plaintiff invited Butler and the others to participate at his expense and which he and Butler were on their way to play when the collision occurred was for any purpose other

Mr. Baker: It has been examined at all, your Honor. Counsel has pointed out, he says under the Corporation act.

1. The first of these is the fact that the

Mr. Robinson: Brought out on direct.

Mr. Baker: No, it wasn't. He didn't put him on the stand.

THE UNIVERSITY OF CHICAGO

1. The first step is to identify the problem or goal. This involves understanding the current situation and what needs to be achieved.

Mr. Walker: He wasn't under, but I don't want to take

proves it better than history. I object to it.

1944-1945

THE COURT: All right, we will adjourn.

Mr. Robinson, 9. Were the

Mr. Baker: The same objection.

The Court: He may

Mr. Baker: I don't want to

The Court: All right.

A. What kind of elevator?

Mr. Robinson: A. And how many stories left?

A. What kind of elevator?

any kind, in these fields. I've been

1912-13

...at the same time, the ...

604

1. The first of these is the fact that the

... ..

Q. There is machinery for cutting paper there?

• 20Y • A

Q. That run by electricity, motor?

.A .Yen.

9. And the cutting is done with some kind of a knife, or

Systemic to correct that

Y
A

even I could not

1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific information required.

10-10-41

appears to be a witness over there. I move to strike it

... ..

Mr. Robinson Of course it isn't in

1000

There was not even the slightest implication in this case

offense in light of that I advised you and the other

to participate at his expense and which he and Butler were on that

than recreation and pleasure until Butler's cross-examination by counsel for the receivers. After stating on this cross-examination that, while one of the purposes of the golf game was not necessarily to promote the business of the Butler Paper Company, he certainly hoped it would do so, and that one of the reasons for his acceptance of Cobean's invitation to play was to "add dignity to the party" and on cross-examination by plaintiff's counsel that he was going to play golf that day for "my pleasure," Butler finally answered "yes" to a question as to whether one of the purposes of the golf game was to promote the business of the company of which plaintiff was an officer. This was merely his conclusion and certainly did not even tend to show that such was plaintiff's purpose or that plaintiff was engaged in his company's affairs, either as an executive or an employee, at the time and place of his injury.

If one of the purposes of the golf game was to promote the business of plaintiff's employer through the social contacts incident thereto, even then the injuries sustained by Cobean surely could not be held to have arisen out of and in the course of his employment, and even if it could be held that his injuries did arise out of and in the course of his employment, still the relation of plaintiff to the Butler Paper Company and the accident in question would not come under the Workmen's Compensation act.

In Ryan v. State Auto Parts Corp., 255 Ill. App. 422, where plaintiff was an executive officer of a company which was automatically under the Workmen's Compensation act by reason of the character of its business and he was injured in the performance of certain duties for his company on the premises of the defendant in that action, in passing upon plaintiff's status as to whether he was entitled to prosecute his claim at common law, this court held at pp. 424-25-26-27:

"Defendant quotes section 5 of the Workmen's Compensation Act of 1925, Cahill's St., ch. 48, par. 205, defining the term 'employee' as 'every person in the service of another under any

than recreation and pleasure until Butler's cross-examination by counsel for the receivers. After stating on this cross-examination that, while one of the purposes of the golf game was not necessarily to promote the business of the Butler Paper Company, he certainly hoped it would do so, and that one of the reasons for his acceptance of Cohen's invitation to play was to "add dignity to the party" and on cross-examination by plaintiff's counsel that he was going to play golf that day for "my pleasure," Butler finally answered "yes" to a question as to whether one of the purposes of the golf game was to promote the business of the company of which plaintiff was an officer. This was merely his conclusion and certainly did not even tend to show that such was plaintiff's purpose on that plaintiff was engaged in his company's affairs, either as an executive or an employee, at the time and place of his injury.

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"Defendant quotes section 2 of the workmen's compensation act of 1923, Gen. Stat., ch. 48, par. 205, defining the term 'employee' as 'every person in the service of another under any

contract of hire, express or implied, oral or written,' etc. It is argued that this comprehends the plaintiff, who was under a contract of hire with the Motor Transportation Company and therefore plaintiff comes within the act.

"We are not disposed to agree with this contention. The Workmen's Compensation Act contemplates the relation of master or employer, on the one hand, and servant or employee on the other. One who is an officer of a corporation, while acting as such, represents the corporation and his acts are the acts of the corporation. He makes the contracts of employment of the corporation with the employees, and it would be an obvious misnomer to call him an employee while so acting for the corporation. In Harper's Workmen's Compensation Act (2nd ed.), page 202, section 106, it is said: 'The law with reference to workmen's compensation contemplates two persons standing in the opposing relations of master and servant, employer and employee, plaintiff and defendant, or a person entitled to judgment or an award in his favor against another person obligated to pay it. The law does not contemplate the anomaly of one person occupying this dual relation and paying himself for injuries received, with the funds in which he has a joint interest. It is therefore generally held that executive officers of private corporations and members of partnerships are not entitled to compensation for injuries sustained in connection with the industry carried on by them, because a person cannot be at one and the same time employer and employee.'

* * *

"From a consideration of these and many other decided cases we hold that in the instant case plaintiff, while investigating trucks which defendant was offering for sale with a view of purchasing the same on behalf of the Motor Transportation Company, was acting in his official capacity as the executive manager of his company, and that while injured in performing this duty he was not doing the work of an employee and hence would not come under the Workmen's Compensation Act."

In Stevens v. Industrial Commission, 346 Ill. 495, in approving the conclusion reached by this court in the Ryan case, supra, our Supreme Court said at pp. 499-500-501:

"The defendants in error base their defense on the proposition that Stevens was engaged in an official capacity at the time he was injured and that the relation of employer and employee did not exist between him and the Dolan Company, and it is said that he was several blocks away from the plant for the purpose of collecting a bill - a function which had nothing to do with the manual or mechanical part of the plant but was peculiarly and exclusively a part of his official duties as secretary and treasurer of the corporation. The question is not, however, whether the duty he was performing was mechanical or manual in its nature but whether it was an official duty imposed upon him by the nature of his office as secretary and treasurer. We have already seen that the act applies to all the employees of a corporation, regardless of the nature of their duties or the character of the work in which they were engaged. Whether it applies to the general executive officers of a corporation has never been decided or considered by this court. It was considered by the Appellate Court for the First District

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In Stevens v. Industrial Commission, 246 Ill. 428, 192, 193, our Supreme Court said at pp. 428-430-431:

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in Ryan v. State Auto Parts Corp., 255 Ill. App. 422, which was an action for personal injuries received by the plaintiff through the negligence of the defendant. The defense relied upon by the defendant was that the plaintiff was in the employ of the Motor Transportation Company, and that the plaintiff, his employer and the defendant were all operating under the Workmen's Compensation act, and that under section 29 of the act the action at law by the plaintiff could not be maintained. The business of the Motor Transportation Company was hauling material by truck, and it used between sixty and sixty-five trucks in the conduct of its business. The plaintiff had been connected with the company about fifteen years, was a stockholder and also its superintendent, secretary and purchasing agent. He hired all its employees, bought all the necessary motor parts, made charges for services, entered them on the books of the company and checked all bills. The book-keeper made out and signed all checks and the plaintiff checked them, and, if correct, countersigned them. He received a monthly salary paid by checks countersigned by himself. He signed contracts of the corporation, as the president also did. He did not drive any of the trucks but was the executive officer of the company. He was injured by falling down an open elevator shaft on the defendant's premises negligently left unguarded. He had gone to the defendant's premises to examine some secondhand motor trucks which he had learned that the defendant had for sale, with a view to the purchase of them for his company. The Appellate Court held that in doing this the plaintiff was acting in his official capacity as the executive manager of his company and was not doing the work of an employee and therefore was not under the Workmen's Compensation act. We regard this decision as giving a proper construction to the Workmen's Compensation act in accordance with the weight of judicial authority.

* * *

"The language of our Workmen's Compensation act is more comprehensive than that of the New York act and has been given a broader construction, since we have held in the cases which have been cited that it includes all employees of an employer conducting any of the various forms of extra-hazardous business mentioned in the statute, regardless of the character of their duties. We have not, however, obliterated the distinction between the higher executive officers and its workmen."

Assuming that the sole purpose of the golf game to which Butler was driving Cobean at the time of the collision was to promote the business of the Butler Paper Company, that fact could not bring plaintiff under the Workmen's Compensation act because he would then be acting in his official capacity as the managing executive of this company and not doing the work of an employee.

There are numerous authorities such as the Stevens case, supra, which hold that if an executive officer of a corporation receives injuries while doing work outside his duties as such officer, such as performing service or doing the work of an ordinary employee,

In Lyons v. State Auto Parts Corp., 225 Ill. App. 422, which was an action for personal injuries by the plaintiff against the negligence of the defendant. The defense relied upon by the defendant was that the plaintiff was in the employ of the Motor Transportation Company, and that the plaintiff, his employer and the defendant were all operating under the Workmen's Compensation Act, and that under a section 19 of the act the action at law by the plaintiff could not be maintained. The defendant of the Motor Transportation Company, an hauling material by truck, and it used between sixty and sixty-five trucks in the conduct of its business. The plaintiff had been connected with the company about fifteen years, was a stockholder and also its superintendent, secretary and purchasing agent. He hired all its employees, bought all the necessary motor parts, made charges for services, entered them on the books of the company and checked all bills. The book-keeper made out and signed all checks and the plaintiff checked them, and, if correct, countersigned them. He received a monthly salary paid by checks countersigned by himself. He signed contracts of the corporation, as the president also did. He did not give any of the trucks but was the executive officer of the company. He was injured by falling down an open elevator shaft on the defendant's premises and entirely lost his hand. He had gone to the defendant's premises to examine some secondhand motor trucks which he had purchased that the defendant had for sale, with a view to the purchase of them for his company. The Appellate Court held that in doing this the plaintiff was acting in his official capacity as the executive manager of his company and was not doing the work of an employee and therefore was not under the Workmen's Compensation act. It held that this decision as giving a proper construction to the Workmen's Compensation act in accordance with the weight of judicial authority.

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Assuming that the sole purpose of the act was to which Butler was driving Coburn at the time of the collision was to promote the business of the latter Paper Company, that fact could not bring plaintiff under the Workmen's Compensation act because he could then be acting in his official capacity as the managing executive of this company and not doing the work of an employee. There are numerous authorities such as the Lyons case,

which hold that if an executive officer of a corporation renders services or does the work of an ordinary employee, he is not entitled to the benefits of the act as such officer, but is entitled to the benefits of the act as such employee.

he comes under the compensation act. Nothing appears in the facts here that suggests that plaintiff might come within that classification. Plaintiff and Butler were on their way to play a golf game that could not in legal contemplation have had anything to do with plaintiff's employment either as an executive officer or an employee, and it is inconceivable to us how, under any theory, either his relationship to his employer or his situation at the time of the occurrence could possibly come within the purview of the compensation act.

It is true that after injecting the compensation feature into the case it was abandoned as a possible defense. Nevertheless the evidence on that subject and counsel's prejudicial remarks in connection therewith in the presence of the jury remained in the record and nothing was done either by counsel for the defendants or by the court to dispel from the minds of the jury the erroneous impression that may have been created thereby.

If we assume that Butler and plaintiff were engaged in a joint venture at the time of the collision to promote the "Butler paper business," then the motor trip was a business one, plaintiff was not a guest within the meaning of the Guest act (Boale v. Linsky, 279 Ill. App. 58) and it would not be necessary for him to prove willful and wanton conduct on Butler's part in order to recover from him.

Although plaintiff objected both to the entire line of inquiry and to the specific questions which sought to show the applicability of the compensation act and moved to strike the testimony bearing upon that subject, the receivers now urge that plaintiff's objections, motions to strike and motion for a new trial were not sufficiently specific. With this we are unable to agree.

The receivers then claim that they were entitled to develop and make any legitimate defense which the evidence might disclose and that they were entitled to inquire into the specific duties of

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plaintiff and the hazardous nature of the Butler Paper Company's business "for the purpose of showing, if they could, that he was within the provisions of the Workmen's Compensation act." This contention is without merit. Under the authorities above cited the subject matter of the line of inquiry heretofore set forth did not constitute a legitimate defense in this cause. But even more prejudicial than the inquiry were counsel's statements made in the presence of the jury, supposedly predicated upon the answers elicited from Butler during the course of his cross-examination. Mr. Robinson's statements that "the fact that this man was working for the J. W. Butler Paper Company he came under the Compensation act" and "now if this accident arose in the course of his employment that company is liable under the Compensation act and no common lawsuit can apply," coupled with the fact that it was instilled into the minds of the jury that Cobean had been paid his full salary while incapacitated and that Butler had in the first instance paid his hospital and doctor bills, might well have led the jury to believe and find that plaintiff was entitled only to compensation, and that having been paid his salary and having had his doctor and hospital bills paid by Butler he had already received all that the Compensation act or the law allowed.

The defendant Butler's counsel, Mr. Brown, aided in the endeavor to impress the jury with the alleged applicability of the compensation act to plaintiff's claim. At one point in his cross-examination by Mr. Robinson, Butler was asked if his company stored paper in its Monroe street plant and he answered "yes". Plaintiff objected to the question and moved to strike the answer. A colloquy between counsel ensued, during which Mr. Robinson made the statement in the presence of the jury, heretofore referred to, "he came under the Compensation act." When plaintiff's counsel persisted in his objection that the subject matter was incompetent and not cross-

plaintiff and the hazardous nature of the Butler Paper Company's business "for the purpose of showing, if they could, that the provisions of the company's compensation act." This contention is without merit. Under the authorities above cited the subject matter of the line of inquiry is not one which did not constitute a legitimate defense in this case. But even more prejudicial than the inquiry were counsel's statements made in the presence of the jury, supposedly predicated upon the answers elicited from Butler during the course of his cross-examination. Mr. Robinson's statements that "the fact that this man was working for the U. S. Butler Paper Company he came under the compensation act" and "now if this accident arose in the course of his employment that company is liable under the compensation act and no common law suit can apply," coupled with the fact that it was instilled into the minds of the jury that Coburn had been paid his full salary while incapacitated and that Butler had in the first instance paid his hospital and doctor bills, might well have led the jury to believe and find that plaintiff was entitled only to compensation, and that having been paid his salary and having had his doctor and hospital bills paid by Butler he had already received all that the compensation act or the law allowed.

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examination, Butler's attorney insisted "I did ask him about it," although the character of plaintiff's employer's business was not referred to on the direct examination of the witness. Again, when the motion of counsel for plaintiff "to strike all testimony out relating to the Butler Paper Company having some elevators in their building and it happens to have a warehouse over there," was followed by colloquy between counsel, culminating in Mr. Robinson's statement that "if this accident arose in the matter of his employment that company is liable under the Compensation act and no common lawsuit can apply," and Mr. Robinson then stated that Butler testified that Cobean was "going out for business," Butler's attorney added in the presence of the jury that Cobean himself, testified that he was "going out for business," which was untrue. On both of these occasions the conduct of counsel for Butler materially assisted Mr. Robinson in misleading the trial court with his then contention that Cobean could legally seek redress only for his injuries under the Compensation act.

Care and exactness was the imperative duty of the trial court in its rulings upon the evidence, in order to exclude from the hearing of the jury irrelevant and improper testimony calculated to injuriously affect their minds and judgment in arriving at a verdict. (C. & E. I. R. R. v. Dunworth, 203 Ill. 192; Chicago Union Traction Co. v. Arnold, 131 Ill. App. 599.) The cross-examination of Butler and the prejudicial statements made in the presence of the jury by the experienced, astute counsel for defendants could, in our opinion, have been calculated only to mislead the jury and divert their minds from the real issues involved.

While no objection was interposed to the closing argument of either counsel for defendants, it is pertinent to observe that Mr. Robinson's argument contained a subtle reference to the "business purpose" of Cobean's ride in Butler's automobile, which could have served

examination, Butler's attorney insisted "I did ask him about it," although the character of Plaintiff's lawyer's business was not referred to on the direct examination of the witness. Again, when the motion of counsel for Plaintiff "to strike all testimony out relating to the Butler Paper Company having some elevators in their building and it happens to have a window over there," was followed by colloquy between counsel, culminating in Mr. Robinson's statement that "if this accident arose in the matter of his employment that company is liable under the Compensation act and no common law suit can apply," and Mr. Robinson then stated that Butler testified that Gobson was "going out for business," Butler's attorney added in the presence of the jury that Gobson himself testified that he was "going out for business," which was untrue. On both of these occasions the conduct of counsel for Butler materially assisted Mr. Robinson in misleading the trial court with his then contention that Gobson could legally seek redress only for his injuries under the Compensation act.

Care and exactness was the imperative duty of the trial court in its rulings upon the evidence, in order to exclude from the hearing of the jury irrelevant and improper testimony calculated to injuriously affect their minds and judgment in arriving at a verdict. (O. & N. E. R. R. v. Dunwoody, 203 Ill. 192; Chicago Union Traction Co. v. Arnold, 181 Ill. 492.) The cross-examination of Butler and the prejudicial statements made in the presence of the jury by the expert witness, a true counsel for defendant could, in our opinion, have been calculated only to mislead the jury and divert their minds from the real issues involved.

While no objection was interposed to the closing argument of either counsel for defendant, it is pertinent to observe that Mr. Robinson's argument contained a subtle reference to the "business purpose" of Gobson's ride in Butler's automobile, which could have served

only to refresh the minds of the jury as to the highly improper evidence and statements of counsel concerning the Compensation act. Mr. Brown's argument was replete with statements that had no bearing on the issues involved and many portions of it merely appealed to the prejudice and passion of the jury.

There is nothing about this case which even under the most exaggerated theory could be twisted so as to show any relation between plaintiff's claim and the Workmen's Compensation act, and we can perceive of no other reason for injecting that act into the case than to prejudice the minds of the jury against plaintiff. Having done so, it is fatal error necessitating the depriving of defendants of the fruit thereof. (Union Traction v. Lauth, 216 Ill. 176; Chicago Union Traction v. Arnold, *supra*.)

In our opinion the ends of justice will be best served by a retrial of this case inasmuch as plaintiff has not had that fair and impartial trial which the law guarantees in the protection of the rights of litigants.

As this case will in all likelihood be retried, we refrain from discussing the evidence as to the collision. A careful examination of the instructions convinces us that many of them to which objection is raised by plaintiff were improperly drawn and did not correctly state the law applicable to the issues involved, but we deem it unnecessary to discuss them, feeling that if and when the case is again tried such errors as are contained in the instructions will be eliminated.

A motion, which was reserved to hearing, was heretofore filed April 29, 1935, to strike from the transcript of the record herein the report of proceedings at the trial and to dismiss this appeal. This action was tried in the Superior court before the late Judge H. M. Mangan of the city court of Aurora and judgment entered therein June 30, 1934. Plaintiff was granted sixty days

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There is nothing about this case which even under the most exaggerated theory could be twisted so as to show any relation between Plaintiff's claim and the workmen's Compensation Act, and we can perceive of no other reason for injecting that act into the case than to prejudice the minds of the jury against Plaintiff. Having done so, it is fatal error necessitating the depriving of defendants of the first thereof. (Union Trust Co. v. Smith, 212 Ill.

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A motion, which was reserved to hearing, was heretofore filed April 29, 1935, to strike from the transcript of the record herein the report of proceedings at the trial and to dismiss this appeal. This motion was tried in the Superior Court before the late Judge W. W. Morgan of the city court of errors and judgment entered therein June 30, 1934. Plaintiff was granted sixty days

within which to file the report of proceedings at the trial. Within such sixty days, upon stipulation of the parties, an order was entered August 22, 1934, by the only judge of the Superior court then holding court, extending the time for the filing and approval of the report of the proceedings to September 29, 1934. September 20, 1934, the report was presented to Judge Mangan and he then certified that it was presented on that date for approval. September 26, 1934, Judge Mangan entered an order upon stipulation of the parties extending the time for the filing of the report to October 20, 1934. The following order was entered by Judge Mangan October 17, 1934: "On motion of defendants receivers of the Chicago Surface Lines, leave is given said defendants to file objections herein on or before October 31, 1934, to the report of the proceedings at the trial heretofore presented to the court by the plaintiff within the time provided by law, and hearing on said objections is continued until the further order of the court herein." January 22, 1935, Judge Kelly continued to January 25, 1935, plaintiff's motion to approve the report of proceedings which had theretofore been presented to Judge Mangan, the trial judge, for approval September 20, 1934. January 25, 1935, plaintiff filed a petition in support of his motion of January 22, 1935, which recited, substantially, the facts heretofore set forth as to the report of proceedings and in addition thereto that Judge Mangan was sick during the months of October to December, and died December 24, 1934; that plaintiff had requested the trial judge on several occasions to hear the pending objections and settle the report; and that December 3, 1934, plaintiff's attorney received the following communications from the trial judge:

"December 1, 1934.

City Court of Aurora,
Edward M. Mangan, Judge.
Mr. Earl J. Walker.

Dear Sir:

I received your letter of November 30, concerning the

within which to file the report of proceedings at the trial. Within

such sixty days, upon application of the parties, an order was

entered August 22, 1934, by the only judge of the Superior Court

then holding court, extending the time for the filing and approval

of the report of the proceedings to September 20, 1934. September

20, 1934, the report was presented to Judge Mangum and he then

certified that it was presented on that date for approval. September

20, 1934, Judge Mangum entered an order upon stipulation of the

parties extending the time for the filing of the report to October

20, 1934. The following order was entered by Judge Mangum October

17, 1934: "On motion of defendant's receiver of the Childs & Surace

lines, leave is given said defendant to file objections herein on

or before October 21, 1934, to the report of the proceedings at the

trial heretofore presented to the court by the plaintiff within the

time provided by law, and hearing on said objections is continued

until the further order of the court herein." January 22, 1935,

Judge Kelly continued to January 25, 1935, plaintiff's motion to

approve the report of proceedings which had theretofore been presented

to Judge Mangum. The trial judge, for approval September 20, 1934,

January 25, 1935, plaintiff filed a petition in support of his motion

of January 22, 1935, which recited, substantially, the facts hereto-

fore set forth as to the report of proceedings and in addition thereto

that Judge Mangum was sick during the months of October to December,

and died December 24, 1934; that plaintiff had requested the trial

judge on several occasions to hear the pending objections and settle

the report; and that December 2, 1934, plaintiff's attorney received

the following communications from the trial judge:

"December 1, 1934.

City Court of Kansas,

Edward L. Mangum, Judge.

Mr. Earl J. Walker.

Dear Sir:

I received your letter of November 30, concerning the

bill of exceptions in the Cobean v. Chicago Surface Lines which will need approval. I have been ill in bed for the last two weeks and expect to be able to get around in a week or so. When I am able to get to Chicago I will communicate with you and we can arrange to meet.

Yours very truly,
E. M. Mangan."

The petition prayed that one of the judges of the Superior court hear and dispose of the objections and approve the report of proceedings presented September 20, 1934, and that an order be entered to file same nunc pro tunc as of September 20, 1934.

Defendants insist that since the report of proceedings was not filed in the trial court on or before October 20, 1934, the last date for filing same specified in the order of September 26, 1934, entered during the last extended period, the motion to strike the report of proceedings and to dismiss the appeal should be allowed.

It will be noted that when plaintiff presented the report of proceedings for approval September 20, 1934, he did so within apt time. It was not approved and filed because of objections interposed by defendants. The then period for the filing and approval of the report expired September 29, 1934. To allow further examination of the report as presented, the parties stipulated to the entry of the order of September 26, 1934, extending the time for its approval and filing to and including October 20, 1934. October 17, 1934, on the receivers' motion, they were allowed until October 31, 1934, to file formal objections to the report, and the hearing on same was continued until the further order of the court. Judge Mangan's fatal illness intervened and the objections were not disposed of until after his death.

The report of proceedings was presented to the trial judge within the limits of an extended period for filing same and the rule is that, if a report of proceedings is presented to the trial judge at such time that it can be filed within the time provided by order of the court, the party will not be prejudiced by the neglect or

bill of exceptions in the Copern v. Chicago case which will need approval. I have been ill in bed for the last two weeks and expect to be able to get around in a week or so. I am able to get to Chicago I will communicate with you and we can arrange to meet.

Yours very truly,
J. E. McLaughlin

The petition prayed that one of the judges of the Superior Court hear and dispose of the objections and approve the report of proceedings presented September 20, 1934, and that an order be entered to file same within two days or September 20, 1934.

Defendants insist that since the report of proceedings was not filed in the trial court on or before October 20, 1934, the last date for filing same specified in the order of September 20, 1934, entered during the last extended period, the motion to strike the report of proceedings and to dismiss the appeal should be allowed. It will be noted that when plaintiff presented the report of proceedings for approval September 20, 1934, he did so within apt time. It was not approved and filed because of objections interposed by defendants. The then period for the filing and approval of the report expired September 20, 1934. To allow further extension of the report as presented, the parties stipulated to the entry of the order of September 20, 1934, extending the time for its approval and filing to and including October 20, 1934. October 14, 1934, on the respondents' motion, they were allowed until October 21, 1934, to file formal objections to the report, and the hearing on same was continued until the further order of the court. When defendant's fatal illness intervened and the objections were not disposed of until after his death.

The report of proceedings was presented to the trial judge within the limits of an extended period for filing same and the rule is that, if a report of proceedings is presented to the trial judge at such time that it can be filed within the time provided by order of the court, the party will not be prejudiced by the neglect or

delay of the judge to sign the report until after the time fixed for that purpose has expired. (Hall v. Royal Neighbors, 231 Ill. 185; Underwood v. Hossack, 40 id. 98; Hill Company v. U. S. Guaranty Company, 250 id. 242; Zbinden v. DeMoulin, 328 id. 156.) If the date of presentation of the report of proceedings appears on same an order may be made whenever it is afterward approved and signed to file it nunc pro tunc as of the date of such presentation to the trial judge. (Hawes v. People, 129 Ill. 123; Ferris v. Commercial Nat. Bank of Chicago, 158 id. 237; Hall v. Royal Neighbors, *supra*.)

We find nothing in the provisions of the present practice act or rules of this court or the Supreme court that supercedes or contravenes the rules of law above set forth.

Subsec. C of sec. 1 of rule 36 of the Rules of Practice and Procedure of our Supreme court provides: "The report of the proceedings at the trial consisting of the testimony and the rulings of the trial judge and all matters upon which such rulings were made, and other proceedings which the appellant desires to incorporate in the record on appeal, shall be procured by the appellant and submitted to the trial judge or his successor in office for his certificate of correctness, or where this is impossible because of the absence from the district, sickness or other disability of such judge, then to any other judge of said court, and filed in the trial court within 60 days after the appeal had been perfected." Subsec. C of sec. 1 of rule 1 of the rules or practice of this court contain a similar provision.

The record shows affirmatively that plaintiff had used due diligence to have the report of the proceedings approved, not only after but before the death of the trial judge; and that, although such report had been submitted to the trial judge within apt time, September 20, 1934, and had been certified by him as having been

delay of the judge to enter the report until after the time fixed for that purpose has expired. (Hall v. New York Notaries, 221 Ill. 125; Underwood v. Hoosack, 40 id. 38; Hill Company v. N. P. Guaranty Company, 250 id. 42; Trinder v. DeWolfe, 328 id. 126.)

It the date of presentation of the report of proceedings appears on some an order may be made whenever it is afterwards approved and signed to file it prior as of the date of such presentation to the trial judge. (Hager v. People, 120 Ill. 123; Farris v. Commercial Nat. Bank of Chicago, 128 id. 227; Hall v. New York Notaries, supra.)

We find nothing in the provisions of the present practice set or rules of this court or the Supreme court that supports or contravenes the rules of law above set forth.

Subsec. C of sec. 1 of rule 30 of the Rules of Practice and Procedure of our Supreme court provides: "The report of the proceedings at the trial consisting of the testimony and the rulings of the trial judge and all matters upon which such rulings were made, and other proceedings which the appellant desires to incorporate in the record on appeal, shall be prepared by the appellant and submitted to the trial judge or his successor in office for his certificate of correctness, or where this is impossible because of the absence from the district, sickness or other disability of such judge, then to any other judge of said court, and filed in the trial court within 60 days after the appeal has been perfected." Subsec. C of sec. 1 of rule 1 of the rules or practice of this court contain a similar provision.

The record shown affirmatively that plaintiff had used the diligence to have the report of the proceedings approved, not only after but before the death of the trial judge; and that, although such report had been submitted to the trial judge within the time September 20, 1934, and had been certified by him as having been

presented for his approval on that date, it was not approved by Judge Mangan by reason of his sickness and death. The order signed by Judge Kelly certifying that the report of proceedings was full, true and correct, complied strictly with the rule of court above set forth, which prescribed the circumstances under which a judge of the same court, other than the trial judge, may approve a report of the trial proceedings. Judge Kelly not only had authority but it was his duty to approve the report nunc pro tunc as of September 20, 1934, the date of its presentation to the trial judge.

The motion to strike the report of proceedings and to dismiss the appeal is therefore denied at this time.

For the reasons indicated herein the judgment of the Superior court is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED FOR A NEW TRIAL.

Friend and Scanlan, JJ., concur.

presented for his approval on that date, it was not approved by Judge Wagoner by reason of his sickness and death. The order signed by Judge Kelly certifying that the report of proceedings was full, true and correct, conformed exactly with the rule of court above set forth, which he described the circumstances under which a judge of the same court, other than the trial judge, may approve a report of the trial proceedings. Judge Kelly not only had authority but it was his duty to approve the report immediately as of September 26, 1934, the date of its presentation to the trial judge.

The motion to strike the report of proceedings and to dismiss the appeal is therefore denied at this time.

For the reasons indicated herein the judgment of the Superior court is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED FOR A NEW TRIAL.

Friend and Seaborn, JJ., concur.

38239

347

RUSSELL FIREBAUGH, as trustee,
E. RAY GRANT, as successor-trustee,
and JOHN R. O'CONNOR, as second
successor-trustee,

Appellees,

v.

ARTHUR F. JOHNSON et al.,
(defendants).

On appeal of HELGE ERICKSON,
Appellant.

APPEAL FROM SUPERIOR
COURT, COOK COUNTY.

287 I.A. 618²

MR. PRESIDING JUSTICE SULLIVAN
DELIVERED THE OPINION OF THE COURT.

June 15, 1928, Arthur F. Johnson and his wife and Delbert D. Ehresman and his wife, defendants in this cause, executed and delivered first mortgage bonds aggregating \$98,500 and a trust deed to certain premises known as the Faylor apartments to secure payment of same. Thereafter Helge Erickson secured a judgment against the said defendants for \$7,100.21 and sought to enforce payment of same by filing a creditor's bill and having a receiver appointed for the property involved in this proceeding. Default having occurred in the payment of taxes and interest on the bonds, the trustee, Russell Firebaugh, elected under the terms of the trust deed to declare the entire mortgage indebtedness due and payable. The trustee thereupon filed a bill January 15, 1930, to foreclose the mortgage in behalf of all the bondholders, and the receivership of the property under the creditor's bill was extended to the foreclosure proceeding. A decree of foreclosure and sale was entered December 23, 1930, in which it was found inter alia that Helge Erickson, who was made a party defendant in this cause,

RUSSELL TIMBROUGH, as trustee,
H. MAY GRANT, as successor-trustee,
and JOHN R. O'CONNOR, as second
successor-trustee;

Appellees,

v.

ARTHUR F. JOHNSON et al.,
(defendants).

On appeal of HELGE BRICKSON,
Appellant.

APPEAL FROM SUPERIOR
COURT, COOK COUNTY.

587 I.A. 618

MR. PRESIDING JUSTICE SULLIVAN
DELIVERED THE OPINION OF THE COURT.

June 15, 1933, Arthur F. Johnson and his wife and Delbert

D. Ertzman and his wife, defendants in this cause, executed and

delivered first mortgage bonds aggregating \$28,500 and a trust

deed to certain premises known as the Taylor apartments to secure

payment of same. Thereafter Helge Brickson secured a judgment

against the said defendants for \$7,100.31 and sought to enforce

payment of same by filing a creditor's bill and having a receiver

appointed for the property involved in this proceeding. Default

having occurred in the payment of taxes and interest on the bonds,

the trustee, Russell Timbrough, elected under the terms of the

trust deed to declare the entire mortgage indebtedness due and

payable. The trustee thereupon filed a bill January 15, 1930, to

foreclose the mortgage in behalf of all the bondholders, and the

receivership of the property under the creditor's bill was extended

to the foreclosure proceeding. A decree of foreclosure and sale

was entered December 23, 1930, in which it was found inter alia

that Helge Brickson, who was made a party defendant in this cause,

had a valid subsisting junior lien against the property foreclosed, subject only to the lien of the aforementioned trust deed. The trustee purchased the property at the master's sale and a decree was entered April 8, 1931, approving the sale and for a deficiency. October 10, 1932, Erickson filed a petition to set aside the sale and vacate the decree approving same, followed by numerous supplemental, additional and amended petitions, praying for the same relief. January 17, 1935, the court entered a decree denying the prayer of all Erickson's petitions to set aside the master's sale and the order approving same. It is this decree that Erickson seeks to reverse by this appeal.

The decree of foreclosure under which the sale was held was in the usual form and, after finding that \$107,602.93 was due on the mortgage indebtedness, ordered that the premises involved "be sold by said master in chancery at public auction for cash to the highest bidder" and that the trustee "may bid at any sale of said real estate * * * for the entire amount of said indebtedness * * * and in making settlement with said master in chancery for the amount so bid at said sale, shall be entitled to take credit pro rata in proportion to the amount of said bid for bonds and interest coupons so presented for cancellation in lieu of cash."

The master's report of sale set forth that Firebaugh, as trustee, offered and bid \$93,000, which was the highest and best bid and the property was sold to him for said sum; and that of the amount so bid \$701.25 was paid in cash and the trustee "delivered up for cancellation bonds and coupons aggregating the sum of \$12,436.50, which prorated in accordance with the terms of the decree, entitled complainant to a credit of \$7,716.91," and that "Russell Firebaugh, Trustee, has delivered his receipt for the sum of \$83,733.67."

had a valid subsisting junior lien against the property foreclosed, subject only to the lien of the aforementioned trust deed. The trustee purchased the property at the master's sale and a decree was entered April 8, 1931, approving the sale and for a deficiency. October 10, 1932, Erickson filed a petition to set aside the sale and vest the decree approving same, followed by numerous applications, additional and amended petitions, praying for the same relief. January 17, 1933, the court entered a decree denying the prayer of all Erickson's petitions to set aside the master's sale and the order approving same. It is this decree that Erickson seeks to reverse by this appeal.

The decree of foreclosure under which the sale was held was in the usual form and, after finding that \$107,602.93 was due on the mortgage indebtedness, ordered that the premises involved "be sold by said master in conformity at public auction for cash to the highest bidder" and that the trustee "may bid at any sale of said real estate * * * for the entire amount of said indebtedness * * * and in making settlement with said master in conformity for the amount so bid at said sale, shall be entitled to take credit pro rata in proportion to the amount of said bid for bonds and interest coupons so presented for cancellation in lieu of cash."

The master's report of sale set forth that Erickson, as trustee, offered and bid \$93,000, which was the highest and best bid and the property was sold to him for said sum; and that of the amount so bid \$91.25 was paid in cash and the trustee "delivered up for cancellation bonds and coupons aggregating the sum of \$13,436.50, which he presented in accordance with the terms of the decree, entitled complainant to a credit of \$7,716.51," and that "Ernest Erickson, Trustee, has delivered his receipt for the sum of \$2,723.57."

The defendant Erickson's major contention is that the trustee's failure to pay the amount of his bid in cash or bonds in compliance with the terms of the sale as specified in the decree of foreclosure and sale rendered the sale invalid and that the decree denying his various petitions to set aside such sale and the order approving same was therefore erroneous and improper.

When the chancellor was apprised that Firebaugh as trustee had only paid \$701.25 in cash and delivered only \$12,436.50 in bonds and coupons for cancellation toward the purchase price which he bid at the master's sale, Firebaugh was directed by the court to solicit and secure, if possible, the deposit by the bondholders of sufficient bonds so that the same might be delivered to the master for cancellation toward the purchase price of the property and the sale completed. As a result of Firebaugh's solicitation, a large number of bonds were deposited with him which upon his resignation as trustee January 10, 1933, he turned over to one E. Ray Grant, his successor trustee. Grant as successor trustee continued to solicit the deposit of bonds. Although the period of redemption had long since expired the master refused to deliver his deed of the property to either the trustee or the successor trustee until cash or bonds for cancellation were delivered to him in an amount sufficient to complete the sale.

Grant, the successor trustee, filed a petition November 28, 1934, alleging inter alia "that about January 20, 1933, said Russell Firebaugh turned over to this petitioner a large number of bonds theretofore deposited with him by bondholders for the purpose of applying same on said bid, which said bonds together with other bonds theretofore received by this petitioner from numerous bondholders, and other bonds theretofore deposited with various other persons acting as bondholders committee or independently, were by this petitioner and such other persons deposited with the said William

The defendant Wicks' major contention is that the

trustee's failure to pay the amount of his bid in cash or bonds

in compliance with the terms of the sale as specified in the

deed of foreclosure and sale rendered the sale invalid and that

the deed denying his various petitions to set aside such sale and

the order approving same was therefore erroneous and improper.

Then the chancellor is apprised that Wicks as trustee

had only paid \$701.25 in cash and delivered only \$12,43.80 in bonds

and coupons for cancellation toward the purchase price which he bid

at the master's sale. Wicks was directed by the court to solicit

and secure, if possible, the deposit by the bondholders of sufficient

bonds so that the same might be delivered to the master for can-

culation toward the purchase price of the property and the sale

completed. As a result of Wicks' solicitation, a large number

of bonds were deposited with him which upon his resignation as

trustee January 10, 1933, he turned over to one W. W. Grant, his

successor trustee. Grant as successor trustee continued to solicit

the deposit of bonds. Although the period of resignation had long

since expired the master refused to deliver his deed of the property

to either the trustee or the successor trustee until cash or bonds

for cancellation were delivered to him in an amount sufficient to

complete the sale.

Grant, the successor trustee, filed a petition November 28,

1934, alleging that "this petition is filed for the purpose of

Wicks turned over to this petitioner a large number of bonds

therefore deposited with him by bondholders for the purpose of

applying same on said bid, which said bonds together with other bonds

therefore received by this petitioner from numerous bondholders,

and other bonds therefore deposited with various other persons

acting as bondholders committee or independently, were by this

petitioner and such other persons deposited with the said William

S. Newburger, Master in Chancery as aforesaid, the total amount of bonds so deposited being \$92,600 face value thereof out of a total outstanding of said issue of \$98,500, leaving outstanding and undeposited of said issue bonds to the amount of \$5,900; that said Master estimates and has reported to your petitioner that the pro rata amount due on each of said bonds is 88.9% of the face thereof and that it will require to pay said nondepositing bondholders in cash the sum of \$5,197.31."

The petition alleged also that the successor trustee had made arrangements for a loan of \$12,000, which with the balance of funds in his hands from rents "will be sufficient to pay off said taxes, the money due said [nondepositing] bondholders and the aforesaid expenses and charges" in the event the court directed the master to execute and deliver a deed of the property to him.

The decree appealed from, in addition to denying the several petitions of Erickson to set aside the sale and vacate the order confirming it, ordered that the resignation of Grant as successor trustee be accepted because of discord between him and persons claiming to be bondholders' committees; that one John R. O'Connor be appointed successor-trustee to Grant; and that the master deliver his deed of the premises to O'Connor, as successor-trustee, Firebaugh having assigned his certificate of purchase to said O'Connor.

Defendant Erickson asserts in his brief that "the decree appealed from directed the master to issue a deed to John R. O'Connor without requiring him or the previous trustees to pay or complete the payment of the purchase price bid at the master's sale" and again that "the \$93,000 bid of Russell Firebaugh still remained unpaid and the terms of sale provided in the decree have never been complied with."

It is insisted in the brief of plaintiff trustee that

G. Newburger, Master in Chancery as aforesaid, the total amount of bonds so deposited being \$23,000 less value thereof out of a total

outstanding of said issue of \$23,000, leaving outstanding and undeposited of said issue bonds to the amount of \$2,900; that said Master estimates and has reported to your petitioners that the pro rata amount due on each of said bonds is 88.2% of the face thereof and that it will require to pay said nondepositing bondholders in

cash the sum of \$2,127.31."

The petition alleged also that the successor trustee had made arrangements for a loan of \$12,000, which with the balance of funds in his hands from rents "will be sufficient to pay off said taxes, the money due said [nondepositing] bondholders and the afore-said expenses and charges" in the event the court directed the master to execute and deliver a deed of the property to him.

The decree appealed from, in addition to denying the several petitions of Rickson to set aside the sale and vacate the order confirming it, ordered that the resignation of Grant as successor trustee be accepted because of discord between him and persons claiming to be bondholders' committee; that one John R. O'Connor be appointed successor-trustee to Grant; and that the master deliver his deed of the premises to O'Connor, as successor-trustee, although having assigned his certificate of purchase to said O'Connor.

Defendant Rickson asserts in his brief that "the decree appealed from directed the master to issue a deed to John R. O'Connor without requiring him or the previous trustees to pay or complete the payment of the purchase price bid at the master's sale" and again that "the \$23,000 bid of Russell although still remained unpaid and the terms of sale provided in the decree have never been complied with."

It is insisted in the brief of plaintiff trustees that

"bonds and sufficient cash were ultimately deposited with the master to cover said bid of \$93,000."

The record contains no evidence as to whether or not the balance of the purchase price of \$93,000 was fully paid in cash or by bonds delivered to the master for cancellation. Firebaugh paid \$701.25 in cash at the time of the sale and the only other thing in the record bearing upon the matter is the petition of the successor-trustee Grant containing the allegation heretofore set forth that \$92,600 of the total outstanding bonds of the issue of \$98,500 were deposited for cancellation with the master to apply on the bid. This allegation was not denied in the defendant Erickson's answer to Grant's petition and is, therefore, admitted as true. In the absence of evidence to the contrary, it will have to be presumed that the court would not have directed the master to issue the deed to the premises to O'Connor, the successor-trustee, unless the purchase price had been completely paid and the terms of the sale as set forth in the decree of foreclosure fully complied with.

What appealable interest has Erickson in the sale that gives him a right to complain? Under the terms of the trust deed the trustee was authorized to bid in behalf of all the bondholders. The amount bid was certainly not inadequate and no fraud is urged or appears in connection with the sale. It is difficult to perceive wherein any right of Erickson was affected by the sale or the manner in which the purchase price was paid. His lien was subordinate to the first mortgage lien of the bondholders. As a judgment creditor he had a right to redeem, which he did not exercise. It was not until long after Erickson's right of redemption had expired that he filed his first petition to set the sale aside.

While the method of making the payment of the purchase price bid at the sale was irregular, we know of no reason why the court in the exercise of its sound discretion was not warranted in following

"bonds and sufficient cash were actually deposited with the master to cover said bid of \$25,000."

The record contains no evidence as to whether or not the balance of the purchase price of \$25,000 was fully paid in cash or by bonds delivered to the master for cancellation. Although paid \$25,000 in cash at the time of the sale and the only other thing in the record bearing upon the matter is the position of the successor-trustee Grant containing the allegation heretofore set forth that \$25,000 of the total outstanding bonds of the issue of 1893 were deposited for cancellation with the master to apply on the bid. This

allegation was not denied in the defendant Erickson's answer to Grant's petition and is, therefore, admitted as true. In the absence of evidence to the contrary, it will have to be presumed that the court would not have directed the master to issue the deed to the premises to O'Connor, the successor-trustee, and as the purchase price had been completely paid and the terms of the sale as set forth in the decree of foreclosure fully complied with.

That appealable interest was Erickson in the sale that gives him a right to complain? Under the terms of the trust deed the trustee was authorized to bid in behalf of all the bondholders. The trustee did was certainly not inadequate and no fraud is alleged or appears in connection with the sale. It is difficult to perceive wherein any right of Erickson was affected by the sale or the manner in which the purchase price was paid. His lien was subordinate to the first mortgage lien of the bondholders. As a judgment creditor he had a right to redeem, which he did not exercise. It was not until long after Erickson's right of redemption had expired that he filed his first petition to set the sale aside.

While the method of making the payment of the purchase price did at the sale was irregular, we know of no reason why the court in the exercise of its sound discretion was not warranted in following

the course it did under all the facts and circumstances of this case. In any event no right or interest of his having been infringed or affected, defendant Erickson has no legal or equitable ground for complaint.

Erickson's other contentions are that the trustee and successor-trustee procured the bondholders to deposit their bonds with them for cancellation by misrepresentation and fraud; and that "the decree appointing John R. O'Connor successor-trustee and ordering the master's deed to issue to said John R. O'Connor as successor-trustee was erroneous and improper for want of necessary parties [bondholders] and for want of any pleading or proceedings to support such appointment or trusteeship."

It is readily apparent that the questions raised by these contentions do not involve any interest of Erickson and that the matters complained of did not injuriously affect any of his rights. If bondholders were making these contentions a different situation might be presented. It was only their rights that were involved when the decree appealed from was entered. It is of interest to note that not a single bondholder, depositing or nondepositing, has objected to the sale, the confirmation thereof, the method and manner of making the payment of the purchase price, or to the decree denying Erickson's various petitions to set aside the sale, appointing O'Connor successor-trustee, and directing the master to execute his deed to the property involved and deliver it to O'Connor as such successor trustee.

We have reserved to hearing plaintiff's motion presented June 24, 1935, "to strike appellant's record, same not being properly authenticated by the trial court and also to strike the abstract of the record as same is not based upon an authenticated record, and to strike the brief and arguments, same not being based upon an authenticated record."

the course it did under all the facts and circumstances of this case. In any event no right or interest of his having been infringed or affected, defendant Erickson has no legal or equitable ground for complaint.

Erickson's other contentions are that the trustee and successor-trustee procured the bondholders to deposit their bonds with them for cancellation by misrepresentation and fraud; and that "the decree appointing John R. O'Connor successor-trustee and ordering the master's deed to issue to said John R. O'Connor as successor-trustee was erroneous and improper for want of necessary parties [bondholders] and for want of any pleading or proceedings to support such appointment or trusteeship."

It is readily apparent that the questions raised by these contentions do not involve any interest of Erickson and that the matters complained of did not injuriously affect any of his rights. If bondholders were making these contentions a different situation might be presented. It was only their rights that were involved when the decree appealed from was entered. It is of interest to note that not a single bondholder, depositing or nondepositing, has objected to the sale, the confirmation thereof, the method and manner of making the payment of the purchase price, or to the decree denying Erickson's various petitions to set aside the sale, appointing O'Connor successor-trustee, and directing the master to execute his deed to the property involved and deliver it to O'Connor as such successor trustee.

We have reserved to hearing plaintiff's motion presented June 24, 1935, "to strike appellant's record, same not being properly authenticated by the trial court and also to strike the abstract of the record as same is not based upon an authenticated record, and to strike the brief and arguments, same not being based upon an authenticated record."

While under subsec. 2 of sec. 74, par. 202 of the Practice act (ch. 110, Ill. St. Bar Stats. 1935) "all distinctions between the common law record, the bill of exceptions and certificate of evidence, for the purpose of determining what is properly before the reviewing court, are hereby abolished," those portions of the record which constituted the old common law record may be considered for error appearing therein, even though the report of proceedings at the trial is stricken. The record before us has been properly authenticated and certified by the clerk of the superior court except as to that portion of it contained in the report of proceedings at the trial, which does not even purport to have been approved and certified by the trial judge or any other judge of the superior court. We are at a loss to understand why the clerk of the superior court accepted the alleged report for filing when it had not been approved and certified by the court. The law provides a remedy for the wrongful failure or refusal of the court to certify a report of proceedings properly presented for approval.

If plaintiff's motion to strike was directed only to the report of the proceedings at the trial and to those portions of the abstract and Erickson's brief and argument based upon such report, it would necessarily have to be allowed for the reason already stated that it was not approved and certified by the trial judge or any other judge of the superior court authorized by law to act in his stead. Since the motion embraces the entire record, and the abstract and brief and argument of Erickson in their entirety, it will have to be denied.

For the reasons indicated herein the order or decree of the superior court of January 17, 1935, is affirmed.

AFFIRMED.

Friend and Scanlan, JJ., concur.

While under subsec. 2 of sec. 7, par. 202 of the Practice act (Ch. 110, Ill. St. Bar State, 1938) "All distinctions between the common law record, the bill of exceptions and certificate of evidence, for the purpose of determining what is properly before the reviewing court, are hereby abolished," those portions of the record which constituted the old common law record may be consolidated for error appearing therein, even though the report of proceedings at the trial is mistaken. The record before us has been properly authenticated and certified by the clerk of the superior court except as to that portion of it contained in the report of proceedings at the trial, which does not even purport to have been approved and certified by the trial judge or any other judge of the superior court. We are at a loss to understand why the clerk of the superior court accepted the alleged report for filing when it had not been approved and certified by the court. The law provides a remedy for the wrongful failure or refusal of the court to certify a report of proceedings properly presented for approval. If plaintiff's motion to strike was directed only to the report of the proceedings at the trial and to those portions of the abstract and Erickson's brief and argument based upon such report, it would necessarily have to be allowed for the reason already stated that it was not approved and certified by the trial judge or any other judge of the superior court authorized by law to act in his stead. Since the motion embraces the entire record, and the abstract and brief and argument of Erickson in their entirety, it will have to be denied.

For the reasons indicated herein the order or decree of the superior court of January 17, 1938, is affirmed.

ATTESTED.

Friend and Coleman, JJ., concur.

38525

357

MATILDA YOELIN, administratrix with
the will annexed of the estate of
MICHAEL GORSKI, deceased, et al.,
Appellees,

v.

JOHN KUDLA et al.,
Defendants below.

APPEAL FROM CIRCUIT
COURT, COOK COUNTY.

Rozalia Kudla,
Appellant.

287 I.A. 618³

MR. PRESIDING JUSTICE SULLIVAN
DELIVERED THE OPINION OF THE COURT.

A decree was entered July 9, 1935, partially sustaining and partially overruling the amended and supplemental report of the master in chancery to whom this cause had been referred. This appeal by one of the defendants, Rozalia Kudla (hereinafter referred to as the defendant) seeks to reverse the decree in so far as it overrules the report of the master.

The original plaintiff, Michael Gorski, filed a creditor's bill and a supplement and amendments thereto, the material allegations of which are that upon his application for adjustment of compensation under the Workmen's Compensation act, an award was made in his favor by an arbitrator of the Industrial Commission of Illinois against John Kudla for injuries sustained July 26, 1921, while working in and about a building at 2459 South Whipple street, Chicago; that upon review by the commission the arbitrator's award was set aside and Gorski's petition for compensation dismissed February 20, 1923; that he sued out a writ of certiorari to the

ESTATE OF WILLIAM, administratrix with
the will annexed of the estate of
MICHAEL GORSKI, deceased, et al.,
Appellants,

v.

JOHN KUDLA et al.,
Defendants below.

Rosalie Kudla,
Appellant.

MR. JUSTICE SULLIVAN
DIVERSED THE OPINION OF THE COURT.

387 I.A. 618

A decree was entered July 9, 1933, partially sustaining

and partially overruling the amended and supplemental report of

the master in conformity to whom this cause had been referred.

This appeal by one of the defendants, Rosalie Kudla (hereinafter

referred to as the defendant) seeks to reverse the decree in so

far as it overrules the report of the master.

The original plaintiff, Michael Gorski, filed a creditor's

bill and a supplement and amendments thereto, the material allegations of which are that upon his application for adjustment of

compensation under the Workmen's Compensation act, an award was

made in his favor by an arbitrator of the Industrial Commission

of Illinois against John Kudla for injuries sustained July 26,

1921, while working in and about a building at 2327 North LaSalle

street, Chicago; that upon review by the commission the arbitrator's

award was set aside and Gorski's petition for compensation dismissed

February 20, 1933; that he sued out a writ of certiorari to the

February 20, 1933; that he sued out a writ of certiorari to the

circuit court, which entered an order November 3, 1923, reversing the decision of the industrial commission and finding John Kudla liable under the Compensation act for Gorski's injuries; that pursuant to the order of the circuit court the commission entered an award May 16, 1924, a certified copy of which was recorded August 14, 1924; that this award was affirmed by the supreme court October 19, 1929; that by reason of Kudla's failure and refusal to pay said award judgments were entered against him in the superior and circuit courts, respectively, on March 8, 1930, and July 25, 1930, and that there remains unpaid on said judgments \$7,336.69; that John Kudla, the principal defendant, owns real estate and personal property which is concealed or the title to which is held in trust for him by others; that "said principal defendant has since said May 10, 1922, and since said award of May 16, 1924, and the two judgments thereon above set out, put out of his hands, name or possession, by some pretended sale, assignment, conveyance, gift, confidence, bailment or delivery, or by some other secret or cunning device or contrivance, divers other such real and personal property, with intent to deceive, hinder, delay and defraud your orator of his said judgment and other creditors of their just demand, all which property is held in secret trust by the person or persons to whom the same has been so transferred, and with the private understanding or agreement that the same or some interest therein, belongs of right and shall inure to the benefit of the said principal defendant;" that Rozalia Kudla, the wife of John Kudla, holds title to various parcels of real estate, as well as to personal property, subject to the interest of her husband in same; and that title to this property was so taken in the name of Rozalia Kudla to hinder and prevent the collection of plaintiff's award and judgments.

The bill required the defendants to answer under oath and

The bill required the defendant to answer under oath and
award and judgments.
of Natalia Kudla to Minkov and prevent the collection of dividends
paid in same; and that title to this property was so taken in the name
as well as to personal property, subject to the interest of her in-
wife of John Kudla, holds title to various parcels of real estate,
benefit of the said principal defendant; that Natalia Kudla, the
or some interest therein, belong to right and shall inure to the
formed, and with the private understanding or agreement that the same
trust by the person or persons to whom the same has been so trans-
creditors of their just demands, all which property is held in secret
hinder, delay and defraud your creditor of his said judgments and other
divers other such real and personal property, with intent to receive,
delivery, or by some other secret or unlawful title or contrivance,
tended sale, assignment, conveyance, gift, collation, settlement or
above set out, but out of his hands, name or possession, by some pre-
and since said award of May 16, 1934, and the two judgments therein
by others; that said principal defendant has since said May 16, 1934,
which is concealed on the title to which is held in trust for him
the principal defendant, owns real estate and personal property
there remains unpaid on said judgments \$7,326.00; that John Kudla,
counts, respectively, on March 8, 1930, and July 23, 1930, and that
award judgments were entered against him in the superior and circuit
17, 1930; that by reason of Kudla's failure and refusal to pay said
14, 1934; that this award was affirmed by the supreme court October
award May 16, 1934, a certified copy of which was recorded August
want to the order of the circuit court the commission entered an
liable under the Corporation Act for Got-Mi's injuries; that pur-
the decision of the industrial commission and finding John Kudla
circuit court, which entered an order November 3, 1933, reversing

prayed for discovery, restraining orders against several of the defendants, the appointment of a receiver for the real estate described therein and that the Kudlas be decreed to pay the amounts due plaintiff. Rozalia Kudla filed a sworn answer July 7, 1931, in which she specifically denied all the material allegations of the bill as amended and averred that all the property involved, both real and personal, was purchased with her personal funds.

During the pendency of this litigation John Kudla died March 13, 1934, and while his death was suggested of record in the trial court and the names, ages and addresses of his heirs and next of kin filed therein, the court found in the decree "that it is not necessary to implead said heirs as parties defendant." Plaintiff Gorski died June 9, 1934, and after his death was suggested the bill was amended to include his administratrix with the will annexed of his estate, as well as his heirs and next of kin as parties plaintiff.

The bill sought to have the following property subjected to the lien of the award and judgments: Improved real estate at 2459 South Whipple street, 3848-50 and 3856-58 South Kedzie avenue, all in the city of Chicago, as well as the saloon or coffee shop and the personal property contained therein at 3401 W. 38th street, 20 shares of stock of the Marshall Square State Bank and 50 shares of stock of the Pulaski Coal Company. The bill sought also to have a certain trust deed, in which one Helen Doberstein was named trustee and which was executed by John and Rozalia Kudla to secure the first mortgage indebtedness on the property at 3856-58 South Kedzie avenue, set aside, cancelled and removed as a cloud upon the title to said property, because it was claimed to have been executed and delivered without consideration and as part of the scheme of the principal defendant to prevent the collection of the

prayer for discovery, no further orders against removal of the
decedent, the appointment of a receiver for the real estate
included therein and that the Judge be directed to pay the costs
due Plaintiff. Kowalski filed a sworn answer July 7, 1934, in
which she specifically denied all the material allegations of the
bill as amended and averred that all the property involved, both
real and personal, was purchased with her personal funds.
During the pendency of this litigation John Kowalski died
March 18, 1934, and while his will was suggested or requested in the
trial court and the names, ages and addresses of his heirs and next
of kin filed therein, the court found in the decree that it is not
necessarily to implied said heirs as parties defendant. Plaintiff
thereby filed June 2, 1934, and to her death was suggested the
bill was amended to include his administration with the will annexed
and his estate, as well as his heirs and next of kin as parties
defendant.
The bill sought to have the following property subjected
to the lien of the award and judgment: Improved real estate at
1839 North Fifth Street, Chicago, Illinois, 1839-40 and 1839-40 North Fifth
avenue, all in the city of Chicago, as well as the balance of other
real and personal property contained therein as stated in 1934.
Twenty-five shares of stock of the Chicago & North Western
Company, all of the Chicago & North Western Company. The bill sought
also to have a certain trust fund, in which and John Kowalski
was named trustee and which was suggested by John and Kowalski
to secure the first mortgage indebtedness on the property at 1839-
40 North Fifth Street, set aside, cancelled and removed as a cloud
on the title to said property, because it was claimed to have been
executed and delivered without consideration and as part of the
scheme of the principal defendant to prevent the collection of the

award and judgments by plaintiff.

The master found that plaintiffs failed to sustain the allegations of their bill as to each and all of the above mentioned properties and recommended that the bill of complaint be dismissed for want of equity.

Upon the hearing of the exceptions to the master's report same were sustained by the chancellor as to the coffee shop or saloon at 3401 W. 38th street and the improved real estate at 3848-50 and 3856-58 South Kedzie avenue. The master found as to the improved real estate at 3856-58 South Kedzie avenue (also known as lots 10 and 11) "that the said Rozalia Kudla purchased the said premises from Walter Waishwell for the sum of Fourteen Thousand Dollars (\$14,000) of which Five Thousand Dollars (\$5,000) was paid by her in cash with her own funds and Nine Thousand Dollars (\$9,000) by the execution of a purchase money mortgage in the sum of Nine Thousand Dollars (\$9,000); * * * that the trust deed securing the sum of Nine Thousand Dollars (\$9,000) is a valid lien upon the said premises; that the said Rozalia Kudla and John Kudla at no time had any right, title or interest in and to the said trust deed and the principal note secured thereby." The trust deed above referred to is the trust deed in which Helen Doberstein is named trustee. The exception to the report of the master as to this trust deed was also sustained and the court in its decree found:

"The Court further finds that on February 1, 1925, the principal defendant, John Kudla, and his wife, Rozalia Kudla, codefendant, executed a Trust Deed to Helen Doberstein, who was the wife of Anthony Doberstein, John Kudla's attorney before the Industrial Commission, as security for the payment of Nine Thousand (\$9,000) Dollars, recorded as Document No. 9167127, Book 18016, Page 333, in the office of the Recorder of Deeds of Cook County, Illinois, but the Court finds that there was no consideration for said trust deed and it was made and recorded as a part of the scheme of the principal defendant, John Kudla, and his wife Rozalia Kudla, to avoid paying the compensation to Michael Gorski, and said trust deed is hereby set aside and cancelled as fraudulent, and as having been made for no consideration, and is hereby removed as a cloud from the title of the real estate described herein as [description of premises] said

Helen Doberstein having defaulted after being personally served with summons herein, and there not having been any consideration proved herein for said trust deed, and said trust deed is hereby cancelled and set aside and held for naught."

As to the property at 2459 South Whipple street, the decree found that "John Kudla paid for this property and was the real owner thereof," but that its conveyance by Kudla and his wife, Rozalia, to the Lelkos, and by them in turn to Adam and Valeria Smalarz, was not fraudulent and that the deed to the latter should not be set aside. The decree found that plaintiffs waived any interest they might have had in the 20 shares of stock of the Marshall Square State Bank and as to the Pulaski Coal Company stock found "that the 50 shares of stock of the Pulaski Coal Company were sold and transferred to said company. That said transfer and sale was in good faith and for a valuable consideration and that the stock cannot be applied to the payment of the judgments." No cross appeal having been taken by plaintiffs from the findings of the decree as to the Whipple street property, the bank ^{stock,} or the coal company such findings cannot be questioned on this appeal.

As to the improved real estate at 3848-50 South Kedzie avenue (also known as lot 9) the decree found "that on May 15, 1929, Rozalia Kudla, codefendant wife of John Kudla, principal defendant, took title by warranty deed from William Witwicki and wife to the * * * real estate located at 3848-50 South Kedzie avenue, Chicago, Ill., but that the consideration for said conveyance was paid by John Kudla, and it equitably was owned by him, and that said property is subject to a lien for the collection of said judgments of this creditor, Michael Gorski, as alleged in the Bill of Complaint. * * * And that Court finds that the transaction was had in the office of attorney Anthony Doberstein, who represented John Kudla before the Industrial Commission Arbitrator before the first award was entered, and that he was representing Rozalia Kudla and John Kudla

Heisen Robert in having obtained after being personally served with summons herein, and there not having been any consideration proved herein for said deed, and said deed is hereby cancelled and set aside and held for naught.

As to the property at 3843 North High Street, the decree found that "John Kulis paid for this property and was the real owner thereof," but that its conveyance by Kulis and his wife, Rosalia, to the Defenses, and by them in turn to Adam and Valeria Smolens, was not fraudulent and that the deed to the latter should not be set aside.

The decree found that plaintiff's wives any interest they might have had in the 20 shares of stock of the Pittsburgh & West Virginia Coal Company and as to the Pittsburgh Coal Company stock found "that the 20 shares of stock of the Pittsburgh Coal Company were sold and transferred to said company. That said transfer and sale was in good faith and for a valuable consideration and that the stock cannot be applied to the payment of the judgments." No cross appeal having been taken by plaintiffs from the findings of the decree as to the High Street property, the bank took on the coal company ^{stock} ~~which findings~~ cannot be questioned on this appeal.

As to the improved real estate at 3843-39 North High Street (also known as lot 9) the decree found "that on May 10, 1927, Rosalia Kulis, co-defendant wife of John Kulis, principal defendant, took title by warranty deed from William Litacki and wife to the *** real estate located at 3843-39 North High Street, Indiana, Ill., but that the consideration for said conveyance was paid by John Kulis, and it was admitted by him, and that said property is subject to a lien for the collection of said judgments on this creditor, Richard Gorka, as alleged in the bill of complaint. *** And that Court finds that the transaction was and in the office of attorney Anthony J. Gorka, who represented John Kulis before the Industrial Commission Arbitrator, before the first award was entered, and that he was representing Rosalia Kulis and John Kulis

when title was placed in the name of Rozalia Kudla instead of John Kudla, the real owner; and that it was a ruse to prevent the lien of the award and the judgment that would be finally entered thereon in the appeal of John Kudla then pending in the Supreme court from attaching as a lien to the title of said real estate; and the Court finds that said property is liable for the payment of the two judgments sought to be collected herein for the complainants, and should be sold and the proceeds thereof applied to the payment of said judgments, and the amounts due the complainants, as found in this Decree."

As to the property 3856-58 South Kedzie avenue (also known as lots 10 and 11) the decree found "that on November 23, 1925, Rozalia Kudla, codefendant, wife of John Kudla, principal defendant, took title by warranty deed from Walter Waishwell and wife, Mary Waishwell, to the following real estate, but the consideration was paid by John Kudla, for said conveyance and said property was equitably owned by him; and there is no credible proof in the record that Rozalia Kudla ever paid for said property or ever had sufficient money of her own to pay for said conveyance, and that said property is subject to the two judgments of Michael Gorski sought to be collected in this Creditor's Bill proceeding, and that taking title in the name of Rozalia Kudla, was merely a ruse on the part of John Kudla, and his wife, Rozalia Kudla, to avoid payment of the award, certified copy of which had been filed with the Recorder of Deeds on August 14, 1924, prior to said transaction, said property being described as follows and located at 3856-58 South Kedzie Avenue, on the corner of Kedzie and 39th Street, on which the filling station operated by codefendants John Tracey and Henry Tracey, operating as Tracey Bros., is situated: [description follows]. And the Court finds that said property is held in the name of

When title was placed in the name of Rosalia Kudla instead of John Kudla, the real owner, and that it was a mere device to prevent the claim of the award and the judgment that would be finally entered thereon in the appeal of John Kudla then pending in the Supreme Court from attaching as a lien to the title of said real estate; and the Court finds that said property is liable for the payment of the two judgments sought to be collected herein for the complainants, and should be sold and the proceeds thereof applied to the payment of said judgments, and the amounts due the complainants, as found in this decree."

As to the property 1886-88 South Kedzie Avenue (also known as lots 10 and 11) the decree found "that on November 23, 1935, Rosalia Kudla, defendant, wife of John Kudla, principal defendant, took title by warranty deed from Walter Kuchowski and wife, Mary Kuchowski, to the following real estate, but the consideration was paid by John Kudla, for said conveyance and said property was undoubtedly owned by him; and there is no credible proof in the record that Rosalia Kudla ever paid for said property or ever has sufficient money of her own to pay for said conveyance, and that said property is subject to the two judgments of Michael Borcia sought to be collected in this creditor's Bill proceeding, and that said title in the name of Rosalia Kudla, was merely a ruse on the part of John Kudla, and his wife, Rosalia Kudla, to avoid payment of the award, certified copy of which has been filed with the Recorder of Deeds on August 14, 1934, prior to said transaction, said property being described as follows and located at 1886-88 South Kedzie Avenue, in the corner of Kedzie and 18th Street, on which the station operated by defendant John Kudla and Tracy Tracy, operating as Tracy Bros., is situated (description follows). And the Court finds that said property is held in the name of

Rozalia Kudla subject to the two judgments of Michael Gorski sought to be collected in this proceeding, and that the said real estate should be sold and the proceeds of sale applied to the payment of the two judgments and the amounts due under this decree, and that until such sale and application is had, the Court reserves the right to pass upon any application for the appointment of a Receiver to take charge of said property, collect the income and manage the same."

As to the coffee shop or saloon at 3401 W. 38th street, the decree found "that the coffee shop or saloon at 3401 West Thirty-eight street described in the bill of complaint, was the property of John Kudla and was his chief source of income, and that he was at all times the owner thereof, and operated said saloon or coffee shop. The Court further finds that all the personal property in said saloon, and the business itself were still owned and operated by John Kudla, judgment debtor and principal defendant herein, up to the time of his death on March 13, 1934; that said saloon and coffee shop was owned and operated by John Kudla in his own name since its purchase, and more particularly since 1918, and that it has never at any time been owned by Rozalia Kudla; that said saloon and coffee shop was the sole source of income of John Kudla and Rozalia Kudla, except such income as was derived from the real estate, stock, etc., owned by said John Kudla; and the court hereby orders that the said coffee shop or saloon and its fixtures, furniture and furnishings and the business itself be sold as hereinafter provided and the proceeds applied to the payment of the two judgments and all sums due complainants under this decree."

Defendant contends "that the master who had the benefit of observing the demeanor of the witnesses found correctly that the bill should be dismissed for want of equity; that the weight of the evidence was with the defendants and that separately from that the

...subject to the two judgments of Michael ...
to be collected in this proceeding, and that the ...
should be sold and the proceeds of sale applied to the payment of
the two judgments and the amounts due under said decrees, and that
until such sale and application is made, the Court reserves the right
to make any application for the appointment of a Receiver to
take charge of said property, collect the income and manage the same.
As to the coffee shop on Nelson St. 1834 street,
the decree found "that the coffee shop on Nelson St. 1834 street
thirty-eight street described in the bill of complaint, was the
property of John Kudla and was his chief source of income, and
that he was at all times the owner thereof, and operated said
saloon or coffee shop. The Court further finds that all the
personal property in said saloon, and the business itself were
still owned and operated by John Kudla, Judgment Debtor and
principal defendant herein, up to the time of his death on March
13, 1934; that said saloon and coffee shop was owned and operated
by John Kudla in his own name since its purchase, and more particu-
larly since 1918, and that it has never at any time been owned by
Rosalia Kudla; that said saloon and coffee shop was the sole source
of income of John Kudla and Rosalia Kudla, except such income as
was derived from the real estate, stock, etc., owned by said John
Kudla; and the Court hereby orders that the said coffee shop or
saloon and its fixtures, furniture and furnishings and the business
itself be sold as hereinbefore provided and the proceeds applied to
the payment of the two judgments and all other due obligations
under this decree."
The record contains "that the witness who had the benefit of
operating the business of the saloon found contrary that the
will should be allowed for want of equity; that the weight of the
evidence was with the defendants and that separately from that the

plaintiff did not produce sufficient evidence to sustain the allegations of fraud in the face of the sworn answer of the defendant. The defendant further contends that the entry of a decree against John Kudla after his death without making his heirs parties defendant invalidates the entire decree. Further, that the cancelling and removing of the \$9,000 mortgage as a lien from Lots 10 and 11 without having before the Court the owners of the notes or trust deed is manifest error."

Plaintiffs' theory, as stated in their brief, is as follows:

"(1) The court had full authority to either affirm or overrule the Master's report, or to partially affirm and partially overrule as was done in this case. A Master's report is only advisory.

"(2) Order as to change of parties is within the discretion of the court under Section 152, Par. 28, Chapter 110. (Saving Clause as to Change of Parties.) No administratrix had been appointed for John Kudla, and the only necessary change, the personal representative of Michael Gorski, complainant, was made.

"(3) The court did not err in cancelling out the void and fraudulent mortgage to Helen Doberstein who was personally served with summons and a rule requiring her to answer in five days, and ignored both. The trust deed recites on its face that it was given to secure only one mortgage note to Helen Doberstein, and was due in five years from its date, December 1, 1925. There is no renewal, release or transfer of said trust deed and no extension of record. It was properly cancelled. * * * There are not any outside owners or holders of record, and none complaining herein."

We agree with defendant's statement in her brief that "this case turns on the question of ownership of the coffee shop at 3401 W. 38th street" because the record discloses that this coffee shop was the sole source of income available to either John Kudla or his wife Rozalia Kudla, for investment in the real estate or stocks heretofore enumerated, except such income as may have been derived from the aforementioned real estate and stocks after their acquisition.

Although the proofs of both sides on the original hearing before the master were closed February 18, 1933, long prior to the death of John Kudla March 13, 1934, he did not testify at all in this proceeding. The Kudlas were married in 1910. The testimony of Rozalia Kudla that she, in partnership with Michael Gorski, pur-

plaintiff did not produce any evidence to establish the allegations of fraud in the fact of the loan or of the defendant. The defendant in their answers that the entry of a decree against John Knud after his death without his heirs' assent defendant investigated the same degree. Further, that the selling and removing of the \$5,000 mortgage is a lien from last to and in without having before the court the consent of the hotel or trust deed is manifest error.

Plaintiff's theory, as stated in the brief, is as follows: "1) The court had full authority to enter a decree overruling the Master's report, or to partially affirm and partially overrule as was done in this case. A Master's report is only advisory." (2) Order as to change of parties is within the discretion of the court under Section 133, Civ. Code, Chapter 11, (Savings Clause as to change of parties). No administrative has been appointed for John Knud, and the only necessary change, the personal representative of Michael Knud, son-in-law, was made. (3) The court did not act in error in overruling the Master's report and a wife retaining her to answer in five days, and to secure only one mortgage note to which Knud was due in five years from the date, December 1, 1932. There is no release or transfer of said trust deed and no extension of record. It was properly cancelled. * * * There is no credit against or holders of record, and none claiming same."

To agree with defendant's statement in her brief that this case turns on the question of ownership of the office shop at 2801 1/2 Street because the record disclosed that this office shop was the sole source of income available to either John Knud or his wife Rosalia Knud, for interest in the real estate or stocks heretofore enumerated, except such income as may have been derived from the aforementioned real estate and stocks after their liquidation. Although the record of both sides on the original hearing before the master was closed February 10, 1933, long prior to the death of John Knud March 18, 1934, he did not testify as to all in this proceeding. The Knuds were married in 1916. The testimony of Rosalia Knud that she, in partnership with Michael Knud, was

chased the coffee shop in question in 1914 from one Felix Janos with \$950 of her own money, which she had brought with her from Massachusetts, and that about seven months later she dissolved her partnership with Gorski by paying him \$250 for his interest, is undisputed. Janos corroborated Rozalia Kudla's testimony as to her purchase of the coffee shop from him.

While, as heretofore stated, the findings of the decree as to the Whipple street property and the stock of the bank and coal company are not subject to review on this appeal, the evidence bearing upon those matters may be properly considered by this court in so far as it throws light on the main issue as to the ownership of the coffee shop and the investments involved here, which are traceable to the income derived from such coffee shop.

Regardless of the method or manner of the original acquisition of the coffee shop or saloon or of who was its original purchaser, the documentary evidence in the record shows, in our opinion, conclusively that John Kudla was the owner of the business, at least since 1917.

December 17, 1917, John Kudla, to secure his indebtedness of \$1,000, executed and delivered to The Bartholomae & Roesing Brewing & Malting Company his chattel mortgage (recorded August 23, 1918) covering the following goods and chattels: "16' bar, 16' back bar, 16' mirror & frame, 16' iron footrail, 4' cigar case, 4' bottle case, 3' x 4' wine box, 21' window screens, 10' vestibule, 4 tap beer pump outfit with all bar & ice box plumbing & connections complete with 1 ice box, water faucet complete, 14' 10" Zinc workboard, 30" cooler, 12' skid, 15/1 basement, 6 stools, 30 chairs, 2 square tables, 2 round tables, #20 Volcano Stove with boiler and all other personal property of said mortgagor (except household goods, wearing apparel and mechanic's tools), including saloon or restaurant furniture, fixtures and glassware and the stock of wines, liquors, cordials

of the coffee shop and the investments involved here, which are traceable to the income derived from such coffee shop. In so far as it throws light on the main issue as to the ownership bearing upon those matters may be properly considered by this court as to the Hipple street property and the stock of the bank and while, as heretofore stated, the findings of the court are undisputed. James corroborated her testimony as to her partnership with Goring by paying him \$50 for his interest, in Massachusetts, and that about seven months later she received from the coffee shop in Lowell in 1911 from one Felix James with \$250 of her own money, which she had brought with her from Lowell, and that about seven months later she received from the coffee shop in Lowell in 1911 from one Felix James

and cigars, which now is or hereafter, until the indebtedness hereinafter mentioned shall be fully paid, may be in and about the premises known as number 3401 W. 38th street, and also the leasehold interest of said mortgagor now held or hereafter acquired by him in and to the premises in or about which the above described goods and chattels now are."

Certificates of stock of the Pulaski Coal Company were issued as fully paid to John Kudla as follows: 10 shares October 4, 1918, 20 shares July 16, 1919, and 20 shares September 19, 1919. The 50 shares represented by these three certificates were assigned on the back thereof by Kudla to the Pulaski Coal Company June 12, 1923.

The ledger sheets covering the checking account of John Kudla in the Marshall Square State Bank were received in evidence. An approximation of his total deposits and checks drawn against this account is as follows for the periods indicated:

<u>"Dates</u>	<u>Checks</u>	<u>Deposits.</u>
May 11, 1920 to Dec. 30, 1920	\$12,967.75	\$13,114.22
Jan. 3, 1921 to Dec. 19, 1921	17,792.49	18,887.57
Jan. 3, 1922 to Dec. 29, 1922	18,011.03	17,974.40
Jan. 3, 1923 to Dec. 27, 1923	30,405.06	29,470.78
Jan. 2, 1924 to Dec. 22, 1924	29,124.51	29,138.33
Jan. 5, 1925 to Dec. 31, 1925	23,936.73	24,115.77
Jan. 4, 1926 to Dec. 22, 1926	2,955.24	2,768.55
Jan. 3, 1927 to Dec. 22, 1927	3,145.01	3,162.18
Jan. 4, 1928 to Dec. 31, 1928	4,801.95	4,859.04
Jan. 5, 1929 to Apr. 21, 1930	1,101.86	969.30."

The ledger sheet from the records of the same bank shows the following deposits and withdrawals from the savings account of John Kudla:

<u>"Date</u>	<u>Withdrawals</u>	<u>Deposits</u>	<u>Balance</u>
May 3, 1920		\$ 400.55	\$ 400.55
July 1, 1920 Interest		2.00	402.55
July 2,		7597.45	8000.00
July 20,		1000.00	9000.00
July 29,	\$1000.00		8000.00
Sep. 16,		1500.00	9500.00
Sep. 21,	1000.00		8500.00
Oct. 21,	8485.00		5.00
Interest to Jan. 1, 1921		.07	5.07
Apr. 4,		800.00	805.07
Apr. 4,	800.00		5.07."

"It is conceded that the \$8,495 shown above to have been withdrawn from this savings account October 21, 1920, was used to make the cash payment on the purchase price of the Whipple street property, which was conveyed to John Kudla and Rozalia Kudla as joint tenants.

Although when it was purchased November 23, 1925, title to the property at 3856-58 South Kedzie avenue was taken in the name of Rozalia Kudla alone, upon its lease to one Harrison for a gasoline filling station September 14, 1929, said lease was executed by both John and Rozalia Kudla.

August 13, 1931, when the Phillips Petroleum Company contracted for a sublease of the last above mentioned premises from one Tracey, the owner's consent was indicated thereon as follows:

"As the owner of the fee title to the premises described in the within lease, I hereby consent to the same and agree to all of the terms and conditions thereof.
John Kudla."

The master improperly excluded a certified copy of a criminal information filed in the United States District Court charging John Kudla, Frankie J. Kudla and Rose Kudla with violation of the National Prohibition act April 20, 1932, in and about the "saloon" at 3401 W. 38th street, as well as a certified copy of the sentence and judgment of the court that John Kudla pay a fine of \$150, that Frankie J. Kudla pay a fine of \$50 and that Rozalia Kudla pay a fine of \$1 upon the defendant's plea of nolo contendere. This evidence was competent at it tended to show John Kudla's interest in the saloon business on said premises.

Pages were introduced in evidence from the summer and November editions of the general and classified Chicago Telephone directories for the years 1931 and 1932, which carried the following: "KUDLA Jno coffee shop 3401 W 38th St. LA Fayette 4691."

Documentary evidence in the record shows that John Kudla

It is conceded that the \$1,000 shown above to have been withdrawn from this savings account October 21, 1932, was used to make the cash payment on the purchase price of the whole first property, which was conveyed to John Kudis and Rosalia Kudis as joint tenants.

Although when it was purchased November 23, 1932, title to the property at 3800-38 North Lehigh Avenue was taken in the name of Rosalia Kudis alone, upon its lease to one Harrison for a period of thirty years beginning September 14, 1932, said lease was executed by both John and Rosalia Kudis.

August 15, 1933, when the Phillips Petroleum Company contracted for a purchase of the first above mentioned premises from one Trecey, the owner's name was indicated thereon as follows: "As the owner of the fee title to the premises described in the within lease, I hereby warrant to the lessee and agree to all of the terms and conditions thereof."

The master inventory enclosed a certified copy of a criminal information filed in the United States District Court showing that Rosalia Kudis, Frankie J. Kudis and Rose Kudis, with violation of the National Prohibition Act April 20, 1933, in and about the "saloon" at 3800 North Lehigh Avenue, as well as a certified copy of the sentence and judgment of the court that said Kudis pay a fine of \$100, that Frankie J. Kudis pay a fine of \$50 and that Rosalia Kudis pay a fine of \$1 upon the defendant's plea of nolo contendere. The verdict was returned as it tended to show John Kudis's interest in the whole business as well as premises.

Pages were introduced in evidence from the current and November editions of the General and Classified Chicago Directory directories for the years 1931 and 1932, which carried the following: "KUDIS, John, 3801 North Lehigh Avenue, Chicago, Ill."

applied for and received upon his payment of \$150 a retail beverage dealer's license for the premises at 3401 W. 38th street, for the last half of the year 1933. There is also in the record a receipt of January 2, 1934, by the City Collector of the City of Chicago to John Kudla for \$250 "same being a deposit paid in advance in connection with an application for a retail liquor dealer's license for the premises" at 3401 W. 38th street.

It was not until after John Kudla's death March 13, 1934, that his wife made an application to the city collector for the issuance of "a city retailer's license for the sale of alcoholic liquor" to her for the term ending June 30, 1934, in which application she certified to the following facts:

1. Applicant's full name - Rose Kudla, 3401 W. 38th St.
2. Location of place of business for which license is sought - 3401 W. 38th Street, Chicago, Illinois, 2 story building store front first & second floor occupied by applicant.
3. State principal kind of business - Retail liquor
4. Date on which foregoing business was begun at this location - October 10, 1914.
5. Date on which applicant began selling alcoholic liquor at this location - December 15, 1933."

Either from his own knowledge of the facts or from information which it is reasonable to infer he received from Rozalia Kudla, the investigating officer in his report attached to her application for the license stated "This business was conducted by applicant's husband, who is now deceased."

The above documentary evidence demonstrates beyond doubt that John Kudla until the time of his death was the owner at least since 1917 of the saloon or coffee shop which was the sole source of the income that went into the various investments of the Kudlas. Rozalia Kudla in a feeble attempt to meet this incontrovertible proof of her husband's ownership of the coffee shop simply states that she did not have time to take care of the banking end of that business and that it was more convenient for her to run the coffee shop in her husband's name. Both the allegations of her sworn

applied for and received a license for the sale of alcoholic beverages for the premises at 441 N. 3rd Street, for the first half of the year 1934. There is also in the record a receipt of January 2, 1934, by the City Collector of the City of Chicago to John Kudla for \$200 "same being a deposit paid in advance in connection with an application for a retail liquor license for the premises" at 441 N. 3rd Street.

It was not until after John Kudla's death March 12, 1934,

that his wife made an application to the city collector for the

issuance of "a city retailer's license for the sale of alcoholic

liquor" to her for the term ending June 30, 1934, in which application

she certified to the following facts:

1. Applicant's full name - John Kudla, 441 N. 3rd St.
2. Location of place of business for which license is sought - 441 N. 3rd St., Chicago, Illinois, 1 story building
3. State principal kind of business - Retail liquor store front with a second liquor room in rear by alleyway.
4. Date on which business was opened - Retail liquor location - October 10, 1934.
5. Date on which business was closed - December 10, 1933.

Neither from his own knowledge of the facts or from information

which it is reasonable to infer he received from John Kudla, the

investigating officer in his report attached to her application for

the license stated "this business was conducted by applicant's hus-

band, who is now deceased."

The above documentary evidence demonstrates beyond doubt

that John Kudla until the time of his death was the owner at least

since July of the saloon or coffee shop which was the sole source of

the income that went into the various investments of the Kudlas.

John Kudla in a feeble attempt to meet this income-taxable

gross of her husband's ownership of the coffee shop which was

that she did not have time to take care of the running of the

business and that it was more convenient for her to run the coffee

shop in her husband's name. Such the allegations of her death

answer and her testimony before the master are refuted by her sworn answers in her application for the retailer's liquor license wherein she stated that, while liquor was sold at retail upon the premises at 3801 W. 38th street since October 10, 1914, she, herself did not begin selling liquor there until December 15, 1933, shortly prior to her husband's death.

It is urged that since the bill of complaint charging that John Kudla owned the coffee shop required an answer under oath, and since Rozalia Kudla's sworn answer denied that John Kudla was the owner thereof, it was incumbent upon plaintiffs to overcome such answer by the evidence of two witnesses or of one witness and circumstances equal to that of another; and that since only documentary evidence was offered in support of the claim of ownership of John Kudla, Rozalia Kudla's sworn answer must prevail. It is sufficient answer to this contention to state that, in addition to the documentary evidence, three witnesses, Smalarz, Obrzut and Czonstka testified, in effect, that John Kudla operated the coffee shop in question. While the testimony of these witnesses may not have furnished the best evidence of Kudla's ownership of the coffee shop it is in the record, and coupled with the convincing documentary evidence heretofore set forth it is, we think, more than ample to meet the requirements of the rule relied upon by defendant in her instant contention.

The record is replete with other evidence of the intent and design of John Kudla and Rozalia Kudla to wrongfully prevent and defeat the collection of Gorski's award and judgments, but we think sufficient has been shown.

We are of the opinion that the improved real estate at 3848-50 South Kedzie avenue and at 3856-58 South Kedzie avenue, title to which was taken in the name of Rozalia Kudla, but which was purchased with income from the coffee shop at 3401 W. 38th street, of which John Kudla was the owner, was properly held to

answer and her testimony before the master are related by her sworn answers in her application for the retailer's license. However, she stated that, while liquor was sold at retail upon the premises at 3401 W. 38th Street since October 10, 1916, she herself did not be in selling liquor there until December 15, 1916, shortly prior to her husband's death.

It is urged that since the bill of complaint charging that John Kudla owned the coffee shop referred in answer under oath, and since Rosalia Kudla's sworn answer denied that John Kudla was the owner thereof, it was incumbent upon plaintiffs to overcome such answer by the evidence of two witnesses or of one witness and circumstances equal to that of another; and that since only documentary evidence was offered in support of the claim of ownership of John Kudla, Rosalia Kudla's sworn answer must prevail. It is sufficient answer to this contention to state that, in addition to the documentary evidence, three witnesses, Charles, Ernest and Constantine testified, in effect, that John Kudla operated the coffee shop in question. While the testimony of these witnesses may not have furnished the best evidence of Kudla's ownership of the coffee shop, it is in the record, and coupled with the convincing documentary evidence heretofore set forth it is, we think, more than ample to meet the requirements of the rule relied upon by defendant in her instant contention.

The record is replete with other evidence of the intent and design of John Kudla and Rosalia Kudla to unlawfully prevent and defeat the collection of Rosalia's taxes and judgments, but we think sufficient has been shown.

We are of the opinion that the improved real estate at 3841-50 South Kudla Avenue and at 2836-38 South Kudla Avenue, title to which was taken in the name of Rosalia Kudla, but which was purchased with income from the coffee shop at 3401 W. 38th Street, of which John Kudla was the owner, was properly held to

be subject to the lien of the judgments based on Gorski's compensation award and that the chancellor properly ordered and directed that such premises, as well as "the coffee shop or saloon and its fixtures, furniture and furnishings and the business itself," should be sold and the proceeds applied to the payment of the two judgments.

As to the finding of the decree that the trust deed from John Kudla and his wife, Rozalia Kudla, to Helen Doberstein, as trustee, was executed without consideration and as part of the scheme of the Kudlas "to avoid paying compensation to Michael Gorski," we think that the chancellor was clearly in error. When the property at 3856-58 Kedzie was purchased from Waishwell in the name of Rozalia Kudla on November 23, 1925, for \$14,000, \$5,000 was paid in cash and the balance of \$9,000 by the execution of a purchase money mortgage in that amount secured by the trust deed to Helen Doberstein. There is not a scintilla of evidence in the record that Helen Doberstein ever had any interest in this \$9,000 mortgage indebtedness except as trustee, but the record does show that Waishwell, from whom this property was purchased, took back this mortgage as part payment of the purchase price and later sold it to one Rybinski for \$9,000. The trust deed to Helen Doberstein securing the \$9,000 indebtedness against the property is a valid lien upon same and John Kudla and Rozalia Kudla never at any time had any right, title or interest in or to the said trust deed or the principal note secured thereby. That portion of the decree setting aside and cancelling this trust deed and removing it "as a cloud from the title" to the property in question must, therefore, be reversed.

It is also urged that since John Kudla died March 13, 1934, more than two years before the decree was entered, his heirs became necessary parties and that since they were not impleaded the decree

be subject to the lien of the judgment dated in 1921. The
 question arose and that the cancelled mortgage was
 directed that such premises, as well as "the other part of a farm
 and its fixtures, furniture and furnishings and the contents thereof,"
 should be sold and the proceeds applied to the payment of the
 judgments.

As to the finding of the decree that the trust deed from
 John Kudla and his wife, Rosalia Kudla, to Helen Dobertstein, as trustee
 was executed without consideration and as part of the scheme of the
 "Kudla" to avoid paying compensation to Michael "Frank," we think that
 the chancellor was clearly in error. When the property at 303-32
 Keale was purchased from Michael in the name of Rosalia Kudla on
 November 22, 1922, for \$14,000, \$3,000 was paid in cash and the
 balance of \$11,000 by the execution of a purchase money mortgage in
 that amount secured by the trust deed to Helen Dobertstein. There
 is not a scintilla of evidence in the record that Helen Dobertstein
 ever had any interest in this \$11,000 mortgage indebtedness except
 as trustee, but the record does show that Michael, from whom this
 property was purchased, took back this mortgage as part payment of
 the purchase price and later sold it to one Edwin Ki for \$2,000.
 The trust deed to Helen Dobertstein securing the \$11,000 indebtedness
 against the property is a valid lien upon same and when it is sold
 Rosalia Kudla never at any time had any right, title or interest in
 or to the said trust deed or the principal note secured thereby.
 That portion of the decree setting aside and cancelling said trust
 deed was removing it "as a cloud from the title" in the property
 in question and, therefore, is reversed.

It is also noted that since John Kudla died March 12, 1921,
 more than two years before the decree was entered, his heirs became
 necessary parties and that since they were not included the decree

is erroneous. It is readily apparent that the question raised by this contention does not involve any interest of Rozalia Kudla and that the matter complained of did not injuriously affect any of her rights.

We reserved to hearing plaintiffs' motion filed October 21, 1935, "for leave to amend the pleadings and decree entered in the Circuit court from which this appeal is prosecuted, instantan on their face, to correct the legal description of the premises at 3848-3850 South Kedzie avenue, one of the properties held liable for the collection of the judgments on which said decree is based, and ordered sold to satisfy the sums found due in said decree, by inserting before the words 'Lot Nine' wherever they appear, the words 'Lots Seven (7), Eight (8).'" This motion will necessarily have to be denied at this time because we have no way of knowing that the proposed amendment merely involves a mistake in the legal description. If that is all it does involve it may be properly presented to the trial court.

For the reasons stated herein the decree of the circuit court is affirmed except as to that portion of it which orders the cancellation of the trust deed on the premises at 3856-58 South Kedzie avenue, executed by John and Rozalia Kudla to Helen Doberstein and the removal of same as a cloud on the title to that property. In so far as the decree pertains to this trust deed or rights accruing under same, it is reversed.

AFFIRMED IN PART AND REVERSED IN PART.

Friend and Scanlan, JJ., concur.

is erroneous. It is really apparent that the evidence relied on
 this contention does not involve any interest of the United
 States and the matter is one of a purely private character
 and of her rights.
 It is not necessary to say that the evidence relied on in the
 1935, "for leave to amend the pleadings and decree entered in the
 circuit court from which this appeal is presented, that under an
 their facts, to correct the legal description of the premises at
 3843-3850 North Kansas Avenue, one of the properties held jointly by
 the collection of the judgment on which said decree is based, and
 awarded said to satisfy the same from the said decree, of the
 setting before the court, but that, wherever they appear, the words
 'West Seven (7)', 'Eight (8)', 'Nine' are all necessarily to be
 to be denied of this case because we have no way of knowing that
 the proposed amendment merely involves a mistake in the legal
 description. If that is all it does involve it may be properly
 presented to the trial court.
 Now the reasons stated herein for the denial of the circuit
 court is affirmed except as to that portion of it which ordered
 the cancellation of the trust deed on the premises at 3843-3850
 North Kansas Avenue, executed by John and Josephine Koble to Maria
 Robert and the removal of said deed to close on the title to that
 property. In so far as this order operates to this trust deed or
 rights accruing under same, it is reversed.
 AFFIRMED IN PART AND REVERSED IN PART.

38571

BERNICE MOTTZ,
Appellee,

v.

PAUL MOTTZ,
Appellant.

36 #
APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

287 I.A. 618⁴

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Bernice Mottz filed an action for separate maintenance against her husband, Paul Mottz, charging cruelty in June, 1931, August, 1931, March, 1932 and November, 1933, and desertion in November, 1933. Defendant filed a cross bill for divorce, charging desertion. The court found the issues in favor of plaintiff, entered a decree of separate maintenance, specifically finding that defendant had been guilty of extreme and repeated cruelty in the month of June, 1931, August, 1931, March, 1932 and October, 1933, and also finding that defendant had willfully deserted and abandoned plaintiff without any reasonable or just cause therefor in the month of November, 1933. Defendant's cross bill was dismissed for want of equity, and this appeal followed.

The parties were married July 27, 1918. Paul Mottz is and has been an employee of the Illinois Central Railroad Company since prior to the marriage. His place of business is located at 208 South LaSalle street, Chicago. Prior to the marriage plaintiff was engaged in the business of dressmaking, and she continued in this enterprise after the marriage of the parties. Her earnings at one time varied from \$150 to \$200 a month and

BENJAMIN KOTTE,
Appellee,
v.
PAUL KOTTE,
Appellant.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

387 I.A. 618

MR. JUSTICE BREWER DELIVERED THE OPINION OF THE COURT.

Bernice Kotte filed an action for separate maintenance against her husband, Paul Kotte, charging cruelty in June, 1931, August, 1931, March, 1932 and November, 1933, and desertion in November, 1933. Defendant filed a cross bill for divorce, charging desertion. The court found the issues in favor of plaintiff, entered a decree of separate maintenance, specifically finding that defendant had been guilty of extreme and repeated cruelty in the month of June, 1931, August, 1931, March, 1932 and October, 1933, and also finding that defendant had willfully deserted and abandoned plaintiff without any reasonable or just cause therefor in the month of November, 1933. Defendant's cross bill was dismissed for want of equity, and this appeal followed.

The parties were married July 27, 1918. Paul Kotte is and has been an employee of the Illinois Central Railroad Company since prior to the marriage. His place of business is located at 308 South LaSalle street, Chicago. Prior to the marriage plaintiff was engaged in the business of dressmaking, and her earnings at one time varied from \$50 to \$100 a month and

were deposited in a joint bank account and used for payment of family expenses and applied on the purchase of some vacant property by the parties. Following their marriage, Mr. and Mrs. Mottz resided with plaintiff's mother for about a year and thereafter occupied several apartments of their own on the south side of Chicago, near defendant's place of business. In 1926 plaintiff, together with defendant's sister, opened a dressmaking shop at 50th street and Harper avenue in Chicago. Two years later plaintiff sold her interest in the business to defendant's sister, and in the spring of 1929 the parties moved to Bloomingdale, Illinois, near Elmhurst. In May, 1931, they moved from Bloomingdale into a seven room house in Elmhurst, where they occupied six rooms and undertook to care for the father of the owner of the house, who occupied the other room. In consideration of this service Mottz paid only a nominal rental of \$10 per month. In July or August of 1931 the parties looked at some apartments on the south side of Chicago. There is some dispute as to the date, defendant contending that this took place in September, 1931, and plaintiff fixing the time as 1933. In the meantime defendant took a room at the Carolan hotel, which he left June 1, 1932, took a room in a private home until the first of January, 1933, when he moved to the Versailles hotel, where he continued to reside at the time of the trial. Between October, 1931, and the spring of 1932, the parties visited each other, defendant spending some of his week-ends at Elmhurst, and plaintiff coming to stay with defendant occasionally during the week at the Carolan hotel. It is evident that between 1931 and the final separation of the parties in November, 1933, defendant sought to persuade plaintiff to give up the home in Elmhurst and the business of dressmaking and come to live with him on the south side in Chicago, near his place of business, and that most of the difficulties between the parties arose out of the apparent

were deposited in a joint bank account and used for payment of

family expenses and applied on the purchase of some vacant

property by the parties. Following their marriage, Mr. and Mrs.

Mottis resided with plaintiff's mother for about a year and there-

after occupied several apartments of their own on the south side

of Chicago, near defendant's place of business. In 1926 plaintiff,

together with defendant's sister, opened a dressmaking shop at 50th

street and Harper Avenue in Chicago. Two years later plaintiff

sold her interest in the business to defendant's sister, and in the

spring of 1929 the parties moved to Bloomington, Illinois, near

Minnetonka. In May, 1931, they moved from Bloomington into a

seven room house in Minnetonka, where they occupied six rooms and

undertook to care for the father of the owner of the house, who

occupied the other room. In consideration of this service Mottis

paid only a nominal rental of \$10 per month. In July or August

of 1931 the parties looked at some apartments on the south side

of Chicago. There is some dispute as to the date, defendant

contending that this took place in September, 1931, and plaintiff

fixing the time as 1932. In the meantime defendant took a room

at the Garland Hotel, which he left June 1, 1932, took a room in

a private home until the first of January, 1932, when he moved to

the Versailles Hotel, where he continued to reside at the time of

the trial. Between October, 1931, and the spring of 1932, the

parties visited each other, but not spending some of his week-ends

at Minnetonka, and plaintiff coming to stay with defendant occasionally

during the week at the Garland Hotel. It is evident that between

1931 and the final separation of the parties in November, 1932,

defendant sought to persuade plaintiff to give up the home in

Minnetonka and the business of dressmaking and come to live with him

on the south side in Chicago, near his place of business, and that

most of the difficulties between the parties arose out of the apartment

unwillingness of plaintiff to give up her business as a dressmaker and the home in Elmhurst and make her domicile with defendant in Chicago.

The first act of cruelty charged is alleged to have occurred in June, 1931. Mrs. Mottz testified that her husband became angered while they were riding along in an automobile and swerved the car toward the ditch; that when she turned off the ignition he knocked her arm and bruised it. Mottz denied this incident, and there was no corroborating evidence. It is highly improbable that Mottz intended to run the car into a ditch, and the legal presumption would be against his doing any act which would equally endanger his own life. Certainly there is no indication from the evidence that he intended to commit an act of cruelty against plaintiff.

The second indicent charged is alleged to have occurred in August, 1931. Mrs. Mottz states that her husband kept her awake until early in the morning, took her belongings and threw them all over the house, and put her out, and that the next day she went to Wheaton and instituted suit for divorce; that she went back to the house the afternoon the bill was filed and stayed there over night. On the evening that summons was served upon defendant Mrs. Mottz still continued to live with her husband as his wife. The acts complained of on this occasion would not constitute cruelty under the authorities in this state.

The third act of cruelty is alleged to have occurred in March, 1932. Mrs. Mottz had continued to operate her dressmaking establishment in Park Ridge, notwithstanding the repeated requests of her husband that she join ^{him} in his domicile on the south side of Chicago. On this occasion Mottz, evidently angered by these circumstances, wrecked her dressmaking shop in Park Ridge. Mrs. Mottz testified to no injury to herself, and certainly there was no proof of any intention on his part to inflict bodily injury upon her.

unwillingness of plaintiff to give up her business as a dressmaker and the home in Winnetka and make her domicile with defendant in Chicago.

The first act of cruelty charged is alleged to have occurred in June, 1931. Mrs. Mott testified that her husband became angered while they were riding alone in an automobile and swerved the car toward the ditch; that when she turned off the ignition he knocked her arm and bruised it. Mott denied this incident, and there was no corroborating evidence. It is highly improbable that Mott intended to run the car into a ditch, and the legal presumption would be against his doing any act which would ordinarily endanger his own life. Certainly there is no indication from the evidence that he intended to commit an act of cruelty against plaintiff.

The second incident charged is alleged to have occurred in August, 1931. Mrs. Mott states that her husband kept her awake until early in the morning, took her belongings and threw them all over the house, and put her out, and that the next day she went to Weston and instituted suit for divorce; that she went back to the house the afternoon the bill was filed and stayed there over night. On the evening that summer was served upon defendant Mrs. Mott still continued to live with her husband as his wife. The acts complained of on this occasion would not constitute cruelty under the authorities in this state.

The third act of cruelty is alleged to have occurred in March, 1932. Mrs. Mott had continued to operate her dressmaking establishment in Park Ridge, notwithstanding the repeated requests of her husband that she join ^{him} in his domicile on the south side of Chicago. On this occasion Mott, evidently angered by these circumstances, wrecked her dressmaking shop in Park Ridge. Mrs. Mott testified to no injury to herself, and certainly there was no proof of any intention on his part to inflict bodily injury upon her.

The last charge of cruelty is fixed as October, 1933. It is at variance with the allegation in the bill, which fixes the time as November, 1933. On that occasion, according to the testimony of Mrs. Mottz, her husband came to a party in her apartment at Park Ridge, after having told her that he would not be able to be present, and forcibly ejected one Hawkins from the apartment. Mrs. Mottz and Mrs. Hawkins tried to interfere, and were pushed aside. If Mrs. Mottz was injured as she stated, it was incidental to the scuffle, but there is no indication that her husband willfully inflicted any injury on her, and Mrs. Hawkins, who was present and testified at the trial, did not testify that Mottz inflicted any injuries on his wife.

All the foregoing incidents occurred after the parties began to live separate and apart from each other, and none of these charges is urged as the cause for the separation. Substantially all the acts of cruelty charged and found by the court to have been extreme and repeated, grew out of altercations between the parties resulting from plaintiff's refusal to give up the Elmhurst home and dressmaking establishment and live with defendant. Voluminous testimony was adduced at the hearing tending to prove plaintiff's charges of cruelty on the one hand and defendant's denial thereof, but the burden of every complaint is lodged in the fact that Mrs. Mottz refused to adopt the domicile of her husband and accede to his wishes that they live at a place on the south side in Chicago which would be more accessible to his place of business. Although condonation was not pleaded by defendant, it is conceded by plaintiff that "from the time defendant moved to the Versailles hotel January 1, 1933, the plaintiff frequently spent the night with defendant at his room," and the evidence indicates that notwithstanding the charges of cruelty made by Mrs. Mottz the parties were on friendly terms until their final separation in November, 1933.

The last charge of cruelty is dated October, 1933. It is at variance with the allegation in the bill, which fixes the time as November, 1932. On that occasion, according to the testimony of Mrs. Motta, her husband came to a party in her apartment at Park Ridge, after having told her that he would not be able to be present, and forcibly ejected one Hawkins from the apartment. Mrs. Motta and Mrs. Hawkins tried to interfere, and were pushed aside. If Mrs. Motta was injured as she stated, it was incidental to the scuffle, but there is no indication that her husband willfully inflicted any injury on her, and Mrs. Hawkins, who was present and testified at the trial, did not testify that Motta inflicted any injuries on his wife.

All the foregoing incidents occurred after the parties began to live separate and apart from each other, and none of these charges is urged as the cause for the separation. Substantially all the acts of cruelty charged and found by the court to have been extreme and repeated, grew out of altercations between the parties resulting from plaintiff's refusal to give up the Elmhurst home and dressmaking establishment and live with defendant. Voluminous testimony was advanced at the hearing tending to prove plaintiff's charges of cruelty on the one hand and defendant's denial thereof, but the burden of every complaint is lodged in the fact that Mrs. Motta refused to adopt the domicile of her husband and accede to his wishes that they live at a place on the south side in Chicago which would be more accessible to his place of business. Although cohabitation was not pleaded by defendant, it is conceded by plaintiff that "from the time defendant moved to the Versailles Hotel January 1, 1933, the plaintiff frequently spent the night with defendant at his room," and the evidence indicates that notwithstanding the charges of cruelty made by Mrs. Motta the parties were on friendly terms until their final separation in November, 1933.

Apparently their only differences were based upon and grew out of Mrs. Mottz's persistence in residing separately and refusing to make her domicile with Mr. Mottz. The rule is well settled that the statute governing separate maintenance, being in derogation of the common law, must be strictly construed (Short v. Short, 265 Ill. App. 133; Wasson v. Wasson, 236 Ill. App. 505) and that a complainant who seeks to be maintained separate and apart from her husband must show not only that she has good cause for living separate and apart but that she does so without any fault on her part. (Decker v. Decker, 279 Ill. 300.) The circumstances of this case do not indicate that Mrs. Mottz lived separate and apart from her husband because of any acts of cruelty committed by him, but because she chose to do so.

It is the established rule of law in this state that the family domicile is that of the husband. (Davis v. Davis, 30 Ill. 180.) If Mr. Mottz desired to change his domicile, and actually moved to Chicago as is indicated by the undisputed evidence, Mrs. Mottz was legally charged with the duty of following him to his new location. (Hunter v. Hunter, 7 Ill. App. 253; Houts v. Houts, 17 Ill. App. 439.) Having refused to do so, without justification, she cannot be separately maintained. (Kennedy v. Kennedy, 37 Ill. 250.) Mr. Mottz's insistence that his wife move to Chicago was not at all unreasonable. He was able to maintain her in a domicile of his own selection. His place of business was located in the loop in Chicago. While they lived in Elmhurst he had to drive approximately four miles to the interurban electric and then proceed by rail to the loop and from there to his office. He preferred to live on the south side in Chicago, where transportation facilities brought him to his place of business more conveniently and in shorter time. Mrs. Mottz's refusal to accede to his request, when persisted in over a period of years, constituted desertion on

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Ill. App. 133; *Wasson v. Wasson*, 232 Ill. App. 403) and that a
complaintant who seeks to be maintained separately and apart from her
husband must show not only that she has good cause for living sepa-
rately and apart but that she does so without any fault on her part.
(*Dooley v. Dooley*, 279 Ill. 300.) The circumstances of this case
do not indicate that Mrs. Mott lived separate and apart from her
husband because of any acts of cruelty committed by him, but be-
cause she chose to do so.
It is the established rule of law in this state that the
family domicile is that of the husband. (*Davis v. Davis*, 39 Ill.
180.) If Mr. Mott desired to change his domicile, and actually
moved to Chicago as he indicated by the undisputed evidence, Mr.
Mott was legally entitled with the duty of following him to his
new location. (*Winters v. Winters*, 7 Ill. App. 454; *Mott v. Mott*,
17 Ill. App. 432.) Having refused to do so, without justification,
she cannot be separately maintained. (*Kennedy v. Kennedy*, 27 Ill.
230.) Mr. Mott's insistence that his wife move to Chicago was
not at all unreasonable. He was entitled to maintain her in a domicile
of his own selection. His place of business was located in the
loop in Chicago. His wife lived in the apartment house and then passed
approximately four miles to the Western Electric and then passed
by rail to the loop and from there to his office. He was required to
live on the south side in Chicago, where transportation facilities
brought him to his place of business more conveniently and in
shorter time. Mrs. Mott's refusal to comply with his request,
when persisted in over a period of years, constituted desertion or

her part.

We have examined the record in this case carefully, and have reached the conclusion that the court erred in decreeing separate maintenance in plaintiff's favor and should have awarded defendant a decree for divorce on ground of desertion. Inasmuch as the entire record is before us, and the cause was heard by the court without a jury, it will be unnecessary to remand the cause for rehearing. The decree of the circuit court is reversed and the cause remanded with directions that a decree be entered in favor of defendant on ground of desertion in accordance with his cross bill of complaint.

DECREE OF THE CIRCUIT COURT REVERSED AND THE
CAUSE REMANDED WITH DIRECTIONS THAT A DECREE
BE ENTERED IN FAVOR OF DEFENDANT ON THE GROUND
OF DESERTION.

Sullivan, P. J., and Scanlan, J., concur.

her part.

Have examined the record in this case carefully, and have reached the conclusion that the court erred in sustaining separate maintenance in plaintiff's favor and should have granted defendant a decree for divorce on ground of desertion. I reached as the entire record is before me, and the same was heard by the court without a jury, it will be unnecessary to remand the cause for rehearing. The decree of the circuit court is reversed and the cause remanded with directions that a decree be entered in favor of defendant on ground of desertion in accordance with his cross bill of complaint.

REVEREND TO THE CIRCUIT COURT OF THE DISTRICT OF COLUMBIA
CAUSE NO. 10,000 IN WHICH
BE PETITIONED IN FAVOR OF DEFENDANT ON THE GROUNDS
OF DESERTION.

Cullinan, P. J., and Graham, J., concur.

38593

377

ROSE GIANNOLA,
Appellee,

v.

GREAT NORTHERN LIFE INSURANCE
COMPANY, a corporation, impleaded
with GUARANTEE TRUST MUTUAL
BENEFIT ASSOCIATION, a
corporation,
Appellants.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

287 I.A. 619¹

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Rose Giannola brought a fourth class contract action in the municipal court involving an accident insurance policy issued by the Great Northern Life Insurance Company (hereinafter called the Great Northern) and sold by the Guarantee Trust Mutual Benefit Association (hereinafter referred to as the Guarantee Trust) to one Maria Passalini. Plaintiff, as the beneficiary named in the policy, had originally instituted suit against the Guarantee Trust alone, but subsequently impleaded the Great Northern by amending her statement of claim. The cause was heard by the court without a jury, resulting in findings and judgment for \$500 against both defendants, from which this appeal is prosecuted.

It appears from the record that Guarantee Trust is a mutual benefit association organized under the laws of this state to write life insurance. Great Northern is a life, accident and health insurance company, organized under the laws of Wisconsin and licensed to do business in Illinois, with its executive offices located in Chicago. Under an arrangement between these two companies, Great Northern issued accident

ROSE GIANNOLA,
Appellee,

v.

GREAT NORTHERN LIFE INSURANCE
COMPANY, a corporation, implied
with GUARANTEE TRUST MUTUAL
BENEFIT ASSOCIATION, a
corporation,
Appellants.

APPEAL FROM JUDICIAL
COURT OF CHICAGO.

307 I.A. 619

MR. JUSTICE FRANKLIN DELIVERED THE OPINION OF THE COURT.

Rose Giannola brought a fourth class contract action in the municipal court involving an accident insurance policy issued by the Great Northern Life Insurance Company (hereinafter called the Great Northern) and sold by the Guarantee Trust Mutual Benefit Association (hereinafter referred to as the Guarantee Trust) to one Maria Cassalini. Cassalini, as the beneficiary named in the policy, had originally instituted suit against the Guarantee Trust alone, but subsequently included the Great Northern by amending her statement of claim. The case was heard by the court without a jury, resulting in findings and judgment for \$500 against both defendants, from which this appeal is prosecuted.

It appears from the record that Guarantee Trust is a mutual benefit association organized under the laws of this state to write life insurance. Great Northern is a life, accident and health insurance company, organized under the laws of Wisconsin and licensed to do business in Illinois, with its executive offices located in Chicago. Under an agreement between these two companies, Great Northern issued accident

policies to Guarantee Trust for its members, which were to remain in force so long as the premium of two cents a week was paid to it in advance by the Guarantee Trust, and so long as the insured remained a member in good standing of the Guarantee Trust.

In September, 1933, the Guarantee Trust sought to increase its membership and as part of the campaign made arrangements by which an application for membership in the association which provided certain life insurance benefits and the payment of \$3 should also include an accident insurance policy issued by Great Northern. September 27, 1933, one J. V. Griseto solicited plaintiff for the sale of such a membership and presented his card showing him to be a representative of Guarantee Trust. He took the application of Maria Passalini, plaintiff's mother, as well as that of plaintiff's husband, for membership in the Guarantee Trust. A receipt, printed on the form of Guarantee trust, showing the receipt of \$3 by the Guarantee Trust, was then given to the insured, who at the time paid Griseto \$3. The face of the receipt contained the following: "To be applied as a membership fee to the Guarantee Trust Mutual." It appears that Griseto sold policies, not only to plaintiff's mother and husband, but also to friends of the Giannola family. Three of the parties to whom these policies were sold testified at the hearing. The evidence is quite voluminous. All the witnesses stated positively that Griseto represented to them that \$1 of the \$3 paid for each membership in the Guarantee Trust was to be applied toward the payment of premiums for one year in advance on the Great Northern accident policies. Griseto denied these representations and stated that he told plaintiff's mother and the other applicants as well that only fifty cents of the \$3 paid with each application was to be applied to the Great Northern accident policy as six months premium in advance. So far as the documentary evidence is concerned, there is nothing in the receipt

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from which it could be determined how the \$3 was to be apportioned between the two companies. The receipt merely states that the Guarantee Trust has received \$3 from the applicant to be applied as a membership fee and that no liability is assumed by the association unless the application is accepted and the certificate delivered to the applicant during his or her lifetime and while in good health. There is a notation on the back of the application stating that "the membership fee is \$2.50 which payment keeps the certificate in force for 30 days after the certificate is issued." It is argued by appellants that the applicant should have understood from this notation that the remaining fifty cents would be applied on the accident policy, and that if Griseto told her that \$1 thereof constituted the premium on the accident policy for one year she should have known that he was not telling the truth. The application on its face contains a list of various personal questions which were required to be answered by the insured, and at the bottom thereof contained a line for the insured's signature. Assuming that the applicant took notice of the notation on the reverse side of the application stating that the membership fee of \$2.50 keeps the certificate in Guarantee Trust in force for thirty days, she still could not have ascertained the length of time for which the premium was paid on the accident policy without consulting the Great Northern policy. There is no other documentary evidence of which the applicant had notice which would have contradicted the representations attributed to Griseto that \$1 of the \$3 paid was to be applied toward the Great Northern policy. From a careful examination of the record we are convinced that there is abundant evidence to sustain the court's finding that Griseto made such representations as the various witnesses testified to, notwithstanding Griseto's denial thereof. Moreover, insurance contracts are more or less difficult for the average layman to understand, and the record discloses that plaintiff's

from which it could be determined how the \$3 was to be apportioned between the two companies. The receipt merely states that the Guaranty Trust has received \$3 from the plaintiff to be applied as a membership fee and that no liability is assumed by the association unless the application is accepted and the certificate delivered to the applicant during his or her lifetime and while in good health. There is a notation on the back of the application stating that "the membership fee is \$2.50 which payment keeps the certificate in force for 30 days after the certificate is issued." It is argued by appellants that the applicant should have understood from this notation that the remaining fifty cents could be applied on the accident policy, and that if Grisco told him that it thereof constituted the premium on the accident policy for one year, he should have known that he was not telling the truth. The application on its face contains a list of various personal questions which were required to be answered by the insured, and at the bottom thereof contained a line for the insured's signature. Appellant took notice of the notation on the reverse side of the application stating that the membership fee of \$2.50 keeps the certificate in Guaranty Trust in force for thirty days; the still could not have ascertained the length of time for which the premium was paid on the accident policy without consulting the Great Northern policy. There is no other documentary evidence of which the applicant had notice which would have contradicted the representations attributed to Grisco that \$1 of the \$3 paid was to be applied towards the Great Northern policy. From a careful examination of the record we are convinced that there is abundant evidence to sustain the court's finding that Grisco made such representation to the various witnesses testified to, notwithstanding Grisco's denial thereof. Moreover, the witness contracts are not on issue for the average layman to understand, and the record discloses the plaintiff's

mother, and in fact all the witnesses who testified in this case to whom policies were sold, were parties of meager education. Some of them did not read or write English at all, and the others had only a very limited knowledge of the language and understood only the simplest sentences and terms. Under the circumstances, the arrangement between these two insurance companies and the rights of the insured under both policies should have been carefully explained. This was apparently not done. They were interested in getting the limited benefits under two policies, one the life benefits under the association membership in Guarantee Trust, and the other in the accident insurance features of the Great Northern. The \$3 which they were paying was to be apportioned between the two insurance companies, and the only means the applicants had of determining how that was to be apportioned was by statements and representations made by Griseto. The oral testimony upon this point therefore becomes of considerable importance, and we are not disposed to disturb the court's findings as to the weight of that evidence.

The amended statement of claim under which the cause was tried alleged that Great Northern issued its policy to Maria Passalini September 27, 1933, and that it was to remain in force as long as the weekly premium of two cents was paid in advance by the Guarantee Trust and accepted by the Great Northern and as long as the insured should be a member in good standing of the Guarantee Trust; that insured paid or caused to be paid to the Guarantee Trust a premium of \$1 for fifty weeks of insurance under the accident policy, which premium the Guarantee Trust was obligated to pay to the Great Northern; that if the Guarantee Trust violated its contract to pay the premium to the Great Northern it became liable to plaintiff for the value of the loss plaintiff thereby sustained, and that if Great Northern received the premium of \$1 from the Guarantee Trust it thereby became liable under its policy. The case was tried upon the theory that the applicant

mother, and in fact all the witnesses who testified in this case to whom policies were sold, were parties of regular education. Some of them did not read or write English at all, and the others had only a very limited knowledge of the language and understood only the simplest sentences and terms. Under the circumstances, the arrangement between these two insurance companies and the rights of the insured under both policies should have been carefully explained. This was apparently not done. They were interested in getting the limited benefits under two policies, one the life benefits under the association membership in Guarantee Trust, and the other in the accident insurance features of the Great Northern. The \$3 which they were paying was to be apportioned between the two insurance companies, and the only means the applicants had of determining how that was to be apportioned was by statements and representations made by Griseolo. The oral testimony upon this point therefore becomes of considerable importance, and we are not disposed to disturb the court's findings as to the weight of that evidence.

The amended statement of claim under which the case was tried alleged that Great Northern loaned the policy to Harris as a loan on September 27, 1933, and that it was to remain in force as long as the weekly premium of two cents was paid in advance by the Guarantee Trust and accepted by the Great Northern and as long as the insured should be a member in good standing of the Guarantee Trust; that insured paid or caused to be paid to the Guarantee Trust a premium of \$1 for fifty weeks of insurance under the accident policy, which premium the Guarantee Trust was obligated to pay to the Great Northern; that if the Guarantee Trust violated its contract to pay the premium to the Great Northern it became liable to Griseolo for the value of the loan principal thereby advanced, and that if Great Northern received the premium of \$1 from the Guarantee Trust it thereby became liable under the policy. The case was tried upon the theory that the applicant

paid \$1 to Guarantee Trust as coverage for one year's premium in advance on the Great Northern policy, and that if Guarantee Trust turned this sum over to Great Northern, then of course the latter would be liable under the terms of its policy because the assured died from an automobile accident within one year; that if the \$1 premium which was collected by Guarantee Trust was not turned over by Great Northern then Guarantee Trust would be liable in damages for the benefits of the policy. It developed, however, in the course of the trial that Guarantee Trust acted as agent for Great Northern in selling its policies, and that Griseto as the representative of Guarantee Trust also became the agent of Great Northern. After all the proofs had been closed and arguments made, a colloquy ensued between the court and counsel from which it became apparent that the court took the view that the secret arrangement between these two companies constituted a fraud on the applicant; that one company acted as agent for the other, and that representations made by its solicitor were binding upon both companies; and that both companies ought to be held liable, the Guarantee Trust for breaching its agreement with insured in not turning over to the Great Northern sufficient money to keep the accident policy in force for one year, and the Great Northern, who issued the policy, on the ground of estoppel because it had constituted the Guarantee Trust as its agent to sell its policies upon representations which the court found Griseto made to the applicant. Therefore, before judgment was entered the court allowed plaintiff to amend her statement of claim so as to introduce the theory of agency into the proceedings. Defendants argue that this constituted error, because the case had been tried upon the theory stated in the pleadings and plaintiff was allowed to inject an entirely new theory into the case after all proofs had been closed and arguments made, and they say that even in a fourth class action in the municipal court a party is limited in his evidence to the claim he has made, and cannot make one claim

in his evidence to the claim he has made, and cannot make one claim in a fourth class action in the municipal court a party is limited all proofs had been closed and arguments made, and they say that even if it was allowed to inject an entirely new theory into the case after it had been tried upon the theory stated in the pleadings and findings. Defendants agree that this constituted error, because the defendant of claim so as to introduce the theory of agency into the judgment was entered the court allowed plaintiff to amend her statement which the court found Griseo made to the applicant. Therefore, before Guarantee Trust as its agent to sell the policy upon representations policy, on the ground of estoppel because it had constituted the policy in force for one year, and the Great Northern, who is and the turning over to the Great Northern sufficient money to keep the accident the Guarantee Trust for breaching its agreement with insured in not upon both companies; and that both companies ought to be held liable, the other, and that representations made by its solicitor were binding constituted a fraud on the applicant; that one company acted as agent for the view that the secret arrangement between these two companies constituted the court and counsel from which it became apparent that the court took the proofs had been closed and arguments made, a colloquy ensued between the Guarantee Trust also became the agent of Great Northern. After all Northern in selling its policies, and that Griseo as the representative course of the trial that Guarantee Trust acted as agent for Great for the benefits of the policy. It developed, however, in the by Great Northern then Guarantee Trust would be liable in damages premium which was collected by Guarantee Trust was not turned over to the insured from an automobile accident within one year; that if the insured would be liable under the terms of its policy because the assured turned this sum over to Great Northern, then of course the latter advance on the Great Northern policy, and that if Guarantee Trust paid \$1 to Guarantee Trust as coverage for one year's premium in

of claim in his statement and recover upon proof of another. The recent trend of decisions does not sustain this contention. The amended statement of claim as finally amended merely conformed with the proof, and the court permitted recovery under the last amended statement of claim upon evidence of agency which was already contained in the record. Much of this evidence was brought into the case by defendants. When the statement of claim was filed plaintiff evidently did not know of the arrangement between these two insurance companies, and it was only after the proof disclosed their relationship that the theory of agency was made applicable to the issues in the case. Rule 125 of the Municipal court rules provides that "the court may, at any stage of the proceedings, allow any party to amend his pleadings in such manner and upon such terms as may be just and all such amendments shall be made as may be necessary for the purpose of determining the real questions and controversies between the parties. * * * Chapter 37, sec. 434, Illinois State Bar Association Statutes, 1935, provides that as applicable to the Municipal court of Chicago "amendments to statements of claim * * * filed by either party, may, in the discretion of the court, be allowed at any time." Numerous cases are cited in plaintiff's brief to sustain the authority of the municipal court to permit such amendments, among them being Walsh v. Fallis, 266 Ill. App. 341; Union Bank of Chicago v. Metropolitan Life Ins. Co., 266 Ill. App. 345; Winitt v. Kornblith, 248 Ill. App. 108, all holding in effect that in the municipal court an action of the fourth class is whatever the evidence makes it, that the pleadings are not controlling, and that the rights of the parties are dependent upon the evidence adduced at the trial. We therefore hold that the municipal court did not err in allowing the amendment to be filed to conform with the proofs made.

It is next urged that plaintiff did not comply with the terms of the policy by showing that insured came to her death in a

manner and under circumstances showing that the loss was covered by the policy in question and to show that proof of loss was given to the defendants as required by the provisions of the policy. On the back of the Great Northern policy is contained the following notation:

"In case of accidental injury, fatal or otherwise, notice, as required by this policy including date, place and other details of the accident, may be given to

GUARANTEE TRUST MUTUAL

who will furnish all assistance required in presenting a claim."

It is conceded that August 27, 1934, four days after the death of Maria Passalini, plaintiff went to the offices of the Guarantee Trust in compliance with the notation on the back of the Great Northern policy, and specifically notified them of her mother's death. She testified that she spoke to Mr. Griseto and told him of the accident and asked him what to do. He advised her to obtain a death certificate and bring it to the office. She then spoke to Mr. Holson, president of the Guarantee Trust and also commissioned by the Great Northern to countersign all the Great Northern accident policies, in order to make them effective. Holson, according to his testimony, says that he told her the life insurance policy was in force but that her accident policy had lapsed; in other words, that liability under the life insurance policy was admitted, but liability under the accident policy was denied, because, as Holson stated, it had lapsed. It is clear from the record that under the arrangement between these two insurance companies Holson was a commissioned agent of the Great Northern, and his statement to plaintiff that liability under that policy would be denied upon the sole ground that the policy had lapsed for nonpayment of the premium, excused plaintiff from furnishing proofs of loss. The authorities so hold. German Fire Insurance v. Gueek, 130 Ill. 345, holds that "proof of loss under a policy of insurance is waived when the company places its refusal to pay solely on the ground that the insured had no title or insurable interest in the

...and under circumstances which the law has covered
to the policy in question and in such cases it has been given
to the defendant as required by the provisions of the policy. On
the back of the Great Northern policy is contained the following

notation:

"In case of accidental injury, total or otherwise, payable
as required by this policy including death, illness and other
benefits of the insured, may be given to
CUMULATIVE BENEFIT FUND
and will furnish all assistance required in connection with the same."

It is contended that August 27, 1934, was after the death of
Marie Perschke, Plaintiff, and that she was in the office of the defendant
in connection with the notation on the back of the Great Northern
policy, and specifically notified them of her husband's death. She
testified that she spoke to Mr. O'Brien and told him of the notation
and asked him what to do. He advised her to obtain a claim payable
and then bring it to his office. He then spoke to Mr. Holman,

President of the Insurance Trust and also learned that by the Great
Northern to provide with all the Great Northern medical policies,
in order to take them effective. Witness, according to his testimony,
says that he told her the life insurance policy was in force and that
her husband's policy was issued; in other words, that Plaintiff knew
the life insurance policy was issued, but Plaintiff never saw
her husband's policy and failed to receive it. It was argued
it is clear from the evidence that under the agreement between them
the insurance companies Holman was a consolidated agent of the Great
Northern, and his statement to Plaintiff that Plaintiff knew that
policy would be issued when she was given the policy was issued

for many years of the previous, written evidence from Plaintiff
group of issue. The notation on back of Great Northern V.
Case, 130 Ill. 342, holds that "where a policy is issued
and is given when the company places its return to pay policy on the
ground that the insured has no right or interest in the

property destroyed."

In Continental Life Insurance Co. v. Rogers, 119 Ill. 474, it was held to be the settled rule that where an insurance company, after a loss has occurred, places its refusal to pay upon some ground not affecting the merits of the case, as, for instance, want of proper notice, all other formal objections not then complained of or pointed out will be regarded as waived.

In Hanon v. Kansas City Life Insurance Co., 269 Ill. App. 135, at p. 151, the court aptly said that "appellant denied any liability under the policy on the sole ground that the policy had lapsed at the time of the death of the insured. This made it unnecessary to furnish any proofs of death." James v. National Life & Accident Ins. Co., 265 Ill. App. 436, is to the same effect.

Guarantee Trust relies principally upon the doctrine of law that a contract of insurance outside the object of the creation of the society and beyond the powers conferred upon it by its charter, bylaws, and the state of its creation, is void as being ultra vires. The burden of proving this defense is always upon the party relying thereon. Under the statute governing the formation of associations similar to Guarantee Trust, the association is authorized "to make and enforce contracts in relation to the business of their association." Directors are authorized to fix fees to be charged applicant for membership, and all or any portion of the amount of such fees may be paid to any person or persons soliciting the applicant to become a member. Thus the right to solicit members and to pay solicitors is expressly conferred by statute, and it would seem to follow that the right to solicit new members carries with it the right to advertise and to promote a campaign for new members. Undoubtedly the arrangement between Guarantee Trust and Great Northern, by which the former distributed the latter's accident policies, was part of a promotional campaign to increase its membership. Guarantee Trust

property destroyed."

In Continental Life Insurance Co. v. Rogers, 111 Ill. 474, it was held to be the settled rule that where an insurance company, after a loss has occurred, places its refusal to pay upon some ground not affecting the merits of the case, as, for instance, want of proper notice, all other formal objections not then brought in of or pointed out will be regarded as waived.

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did not issue the accident policy. It merely acted as agent for the Great Northern in distributing the latter's accident policy, and this we think it had the right to do. Moreover, the contract for insurance in this case was fully performed by applicant, who contracted with the insurance company, and both companies received the benefits from the contract. In that situation there is abundant authority holding that the company cannot invoke the doctrine of ultra vires to defeat an action brought against it on ²performed contract. Will County Nat. Bank v. Champaign County Mutual Relief Ass'n, 259 Ill. App. 201; Bloomington Mutual Benefit Ass'n v. Blue, 120 Ill. 121; Peoria Life Ins. Co. v. International Life & Annuity Co., 246 Ill. App. 38. After soliciting and receiving the advance premiums to be paid to the Great Northern, Guarantee Trust is not in a position to claim that it had no right to distribute the policies. It reaped the benefits of the transaction and should not be heard to breach the contract by interposing the defense of ultra vires.

Finding no convincing reason for reversal the judgment of the municipal court is affirmed.

JUDGMENT AFFIRMED.

Sullivan, P. J., and Scanlan, J., concur.

did not have the accident policy. It merely acted as agent for the Great Northern in distributing the latter's accident policy, and this we think it had the right to do. Moreover, the contract for insurance in this case was fully performed by defendant, who contracted with the insurance company, and both companies received the benefits from the contract. In that situation there is no authority holding that the company cannot invoke the doctrine of ultra vires to defeat an action brought against it on a contract. Will County Nat. Bank v. Northwestern Trust & Safe Deposit Co., 229 Ill. App. 3d 111, 4 p. 301; Windsor for Hotel & Restaurant v. State, 120 Ill. 121; People Life Ins. Co. v. International Life & Accident Co., 246 Ill. App. 38. After soliciting and receiving the advance premiums to be paid to the Great Northern, defendant had no right to claim that it had no right to distribute the policies. It kept the benefits of the transaction and should not be heard to reach the contract by interposing the defense of ultra vires. Finding no convincing reason for reversal the judgment

of the municipal court is affirmed.

JUDGMENT AFFIRMED.

ALLIEN, P. J., and KENNEDY, J., concur.

38651

387

PEOPLE OF THE STATE OF ILLINOIS
ex rel. Oscar Nelson, Auditor of
Public Accounts of the State of
Illinois,

Plaintiff below,

v.

EQUITABLE TRUST COMPANY OF CHICAGO,
a corporation,

Defendant below.

287 I.A. 619²

APPEAL FROM CIRCUIT

COURT, COOK COUNTY.

FIRST NATIONAL BANK OF CHICAGO,
successor by consolidation to
First Union Trust & Savings Bank
as trustee, and GARABED T. PUSHMAN,
intervening petitioners,
Appellants,

v.

WILLIAM L. O'CONNELL, as successor
receiver of Equitable Trust Company
of Chicago, a corporation, respondent
below,

Appellee.

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

The First National Bank of Chicago, successor by consolidation to First Union Trust & Savings Bank as trustee, and Garabed T. Pushman, as interveners, have prosecuted this appeal from two orders entered by the Circuit court of Cook county in a bank liquidation proceeding based upon two intervening petitions, answers thereto filed by the receiver of Equitable Trust Company, William L. O'Connell, who succeeded William J. Maresh, and evidence adduced before the chancellor.

The auditor of public accounts appointed Maresh as receiver December 7, 1931, and thereafter, December 31, 1931, filed his bill

PEOPLE OF THE STATE OF ILLINOIS
ex rel. Oscar Nelson, Auditor of
Public Accounts of the State of
Illinois,
Plaintiff below,

v.

EQUITABLE TRUST COMPANY OF CHICAGO,
a corporation,
Defendant below.

FIRST NATIONAL BANK OF CHICAGO,
successor by consolidation to
First Union Trust & Savings Bank,
as trustee, and GARABED T. RUHMAN,
intervening petitioners,
Appellants,

v.

WILLIAM L. O'CONNELL, an successor
receiver of Equitable Trust Company
of Chicago, a corporation, respondent
below,
Appellee.

MR. JUSTICE FRANKLIN DELIVERED THE OPINION OF THE COURT.

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therein filed by the receiver of Equitable Trust Company, William
L. O'Connell, who succeeded William J. Ruess, and evidence
adduced before the chancellor.

The auditor of public accounts appointed March 22, 1931, filed his bill
December 7, 1931, and thereafter, December 21, 1931, filed his bill

APPEAL FROM DECREE
COURT, COOK COUNTY.

38714.619

for dissolution of the bank. This appeal involves two separate orders covering different parcels of real estate, one located at 2210-16 South Michigan avenue in Chicago (hereinafter referred to as the North property) and the second parcel located at 2218 South Michigan avenue (hereinafter referred to as the bank building) which immediately adjoins the first parcel on the south.

With reference to the North property, it appears that at the time of the appointment of the receiver Equitable Trust Company held a leasehold estate in this parcel of land for a term of ninety-seven years, commencing March 1, 1912, reserving rents payable in quarterly installments. The trust company was the owner of the building constructed upon this property, and the intervening petitioners at the time of the appointment of the receiver owned the fee and the interests of the lessors. In addition to the rent specified in the lease Equitable Trust Company, as lessee, had undertaken to pay all taxes, charges and assessments, general and special, which might be levied or assessed during the continuance of the lease on the land demised and upon any building erected thereon. The receiver, appointed December 7, 1931, collected rents from the tenants in the building during December of that year and January, 1932, purchased coal for heating the building and paid the salary of the janitor.

January 28, 1932, an order was entered by the circuit court authorizing the receiver to reject the lease relative to the North property. The intervening petitioners sought an order directing the receiver to pay the reasonable rental for the premises from December 7, 1931, to January 28, 1932, and also to have their claim for taxes for the years 1930, 1931 and 1932 allowed as a general claim, but the court denied both prayers and by its order of July, 12, 1935, dismissed the intervening petition. One of the purposes

for dissolution of the bank. This appeal involves two separate orders covering different parcels of real estate, one located at 2210-16 South Michigan Avenue in Chicago (hereinafter referred to as the North property) and the second parcel located at 2218 South Michigan Avenue (hereinafter referred to as the bank building) which immediately adjoins the first parcel on the south.

With reference to the North property, it appears that at the time of the appointment of the receiver Equitable Trust Company held a leasehold estate in this parcel of land for a term of ninety-seven years, commencing March 1, 1912, reserving rents payable in quarterly installments. The trust company was the owner of the building constructed upon this property, and the intervening petitioners at the time of the appointment of the receiver owned the fee and the interests of the lessors. In addition to the rent specified in the lease Equitable Trust Company, as lessee, had undertaken to pay all taxes, charges and assessments, general and special, which might be levied or assessed during the continuance of the lease on the land demised and upon any building erected thereon. The receiver, appointed December 7, 1931, collected rents from the tenants in the building during December of that year and January, 1932, purchased coal for heating the building and paid the salary of the janitor.

January 28, 1932, an order was entered by the circuit court authorizing the receiver to reject the lease relative to the North property. The intervening petitioners sought an order directing the receiver to pay the reasonable rental for the premises from December 7, 1931, to January 28, 1932, and also to have their claim for taxes for the years 1930, 1931 and 1932 allowed as a general claim, but the court denied both prayers and by its order of July 12, 1932, dismissed the intervening petition. One of the purposes

of this appeal is to reverse the order thus entered.

The intervening petitioner's claim for the reasonable rental for the premises from December 7, 1931, to January 28, 1932, resolves itself into a question of fact whether the receiver occupied the premises during this period. If he did, he would of course be liable for the reasonable rental thereof even though he ultimately rejected the lease (People v. Equitable Trust Co., 277 Ill. App. 570); but the receiver contends that he did not occupy the premises and so testified. Maresh stated that on the day following his appointment an informal conference was had at the bank building which was attended by Pushman, one of the intervening petitioners, and Messrs. Reinwald and Keeley, attorneys for parties in interest. Maresh testified:

"At that conference on December 8, 1931, I stated very definitely that I would not adopt the lease on the North property. I offered to collect the rents if the people brought them into the bank building and to make any disbursements to cover expenses. I was never in the North building. Mr. Pushman and Mr. Reinwald agreed to it at that time. Some rents were paid to my office as receiver by persons and companies occupying the North building. * * * I made some payments for expenses for janitor services and for fuel and supplies. * * * A second meeting had with Mr. Pushman and Mr. Reinwald was on January 13, 1932. I stated that my decision as to the south property depended on the prospects of getting the bank to organize or the fact of getting the bank organized to take over the lease. * * * the janitor managed the north property in December, 1931, and January, 1932. He was not my janitor. He was Pushman's janitor. I advised Mr. Pushman on the 8th day of December that I would not elect to adopt the terms of that lease. I had not seen the lease at that time. * * * From December 7, 1931, to the end of January, 1932, the tenants were bringing their rents into the bank building. They gave it to one of my employees."

Carabed T. Pushman, one of the intervening petitioners, admitted that he had talked to Maresh after he was appointed receiver, but denied that the receiver had signified his intention to reject the lease; denied that he [Pushman] had ever told the receiver to collect rents or to expend money for fuel and janitor services. M. Lester Reinwald likewise testified to conferences with Maresh at which Mr. Keeley and Pushman were present, but did not recall any conversation wherein Maresh had been requested to

collect rents and pay expenses pending his decision as to whether or not he wished to adopt or reject the lease as receiver. Mr. W. M. Keeley, attorney for the receiver, corroborated Maresh's statement that his plans with reference to the building depended on whether the bank would be reorganized. From this evidence we think the court was justified in finding that the receiver had not taken possession. The receiver's decision was apparently held in abeyance pending the question of the reorganization of the bank. Under the law he had a reasonable time within which to elect whether he would accept or reject the lease. The building had tenants and it was necessary, of course, to supply them with heat and janitor services. It is not unreasonable to suppose that under temporary arrangements with intervening petitioners the receiver was to accept rents from the tenants, give them heat and pay the janitor, pending his decision as to the adoption or rejection of the lease. Evidently Maresh had determined shortly after his appointment that he would not adopt the lease unless a reorganization of the bank could be effected, and we think the court was justified in holding that there was no actual occupancy by the receiver.

The remaining question as to the North property is whether the intervening petitioners should have been allowed a general claim against the estate for 1930, 1931 and 1932 taxes. Under the terms of the written lease Equitable Trust Company was obligated to pay all accrued taxes, which included those for 1930 and 1931. Under ordinary circumstances there would be no question as to the liability of the estate for taxes which had accrued and which had been reserved under the terms of the written lease, but the receiver contends that the taxes were not assessed and levied until after the appointment of the receiver, due to the fact that the entire taxes in Cook county were revalued and reassessed to comply

collect taxes and pay expenses pending his decision as to whether or not he wished to accept the lease as renewed. Mr. J. B. Kealey, attorney for the receiver, corroborated Kealey's statement that the lease with respect to the holding between the parties the bank would be terminated. From this statement we think the court was justified in finding that the receiver had not taken possession. The receiver's decision was not finally held in reference pending the question of the reorganization of the bank. Under the law he had a responsibility that within which to accept or reject the lease. The receiver had found that it was necessary, of course, to supply the bank with fuel for its service. It is not unreasonable to suppose that under temporary arrangements with intervening parties the receiver was to accept rents from the tenants, give them fuel and pay the taxes, pending his decision as to the adoption or rejection of the lease. Although he determined shortly after his appointment that he would not adopt the lease under a reorganization of the bank could be effected, and we think the court was justified in holding that there was no actual occupancy by the receiver.

The remaining question as to the North property is whether the intervening parties should have been allowed a general claim against the estate for 1930, 1931 and 1932 taxes. Under the terms of the written lease parties first through and collected to pay all accrued taxes, which included those for 1930 and 1931. Under ordinary circumstances there would be no question as to the liability of the estate for taxes which had accrued and which had been received under the terms of the written lease, but the receiver contended that the taxes were not received and paid until after the appointment of the receiver, and so the fact that the estate taxes in Cook County were unpaid and assessed to property

with the rules of the state tax commission. However, the evidence offered by intervening petitioners shows the tax levies were all passed and filed for the year 1930 prior to December 31, 1931, and that all tax levies for the year 1931 were passed prior to December 8, 1931 and filed before May, 1932. The receivership estate has not been closed and is still pending. Under these circumstances the receiver who stepped into the shoes of the lessee became liable for the taxes in accordance with the terms of the lease. In Evans v. Illinois Surety Co., 298 Ill. 101, a receiver was appointed for the defendant ^{surety}/company based on a bill for dissolution of the corporation. Three claims were filed by the State of Ohio, which were not ascertainable at the time the receiver was appointed. Notwithstanding this fact the court held that the rights of the State of Ohio existed at the time the receiver was appointed, and the mere fact that the extent of the obligation was not then determinable could not, in reason, defeat the obligation itself. The 1930 and 1931 taxes were provable claims, and we believe the court should have allowed them to be filed even though the amount thereof was not ascertainable at the time the receiver was appointed. Taxes for 1932 had not been levied and we think, therefore, the court properly refused to have them allowed as a claim against the estate.

The facts relative to the bank building located at 2218 South Michigan avenue are as follows: In January, 1910, Pushman, one of the intervening petitioners, as lessor, and Landon C. Rose, as lessee, entered into a written lease whereby the premises were demised to Rose for a term of 99 years ending February 28, 2009. The lease provides that the rentals therein stipulated be paid quarterly in advance and that the lessee shall "pay all taxes, charges or assessments, general or special, which may be levied or assessed against said property." November 29, 1910, the said Landon C. Rose sold, assigned and conveyed unto Michigan Avenue Trust Company the

with the rules of the state tax commission. However, the evidence offered by intervening petitioners shows the tax levies were all passed and filed for the year 1930 prior to December 31, 1931, and that all tax levies for the year 1931 were passed prior to December 31, 1931 and filed before May, 1932. The receivership estate has not been closed and is still pending. Under these circumstances the receiver who stepped into the shoes of the lessee became liable for the taxes in accordance with the terms of the lease. In Living v. Illinois Surety Co., 396 Ill. 101, a receiver was appointed for the defendant company based on a bill for dissolution of the corporation. Three claims were filed by the State of Ohio, which were not ascertainable at the time the receiver was appointed. Notwithstanding this fact the court held that the rights of the State of Ohio existed at the time the receiver was appointed, and the mere fact that the extent of the obligation was not then determinable could not, in reason, defeat the obligation itself. The 1930 and 1931 taxes were provable claims, and we believe the court should have allowed them to be filed even though the amount thereof was not ascertainable at the time the receiver was appointed. Taxes for 1932 had not been levied and we think, therefore, the court properly refused to have them allowed as a claim against the estate.

The facts relative to the bank building located at 2225 South Michigan Avenue are as follows: In January, 1910, Newman, one of the intervening petitioners, or lessor, and Landon C. Rose, as lessee, entered into a written lease whereby the premises were demised to Rose for a term of 99 years ending February 28, 1999. The lease provided that the rentals therein stipulated be paid quarterly in advance and that the lessee shall "pay all taxes, charges or assessments, general or special, which may be levied or assessed against said property." November 22, 1910, the said Landon C. Rose sold, assigned and conveyed unto Michigan Avenue Trust Company the

unexpired estate for years in and to said property, and said Michigan Avenue Trust Company agreed in writing to accept and assume all the terms, covenants and agreements contained in said lease. In February, 1923, Pushman conveyed to Union Trust Company, as trustee, the property described in the lease, and later the Michigan Avenue Trust Company sold, assigned and conveyed to the Equitable Trust Company the unexpired estate for years in and to the property, Equitable Trust Company agreeing in writing to accept and assume all the terms, covenants and agreements contained in the lease. The property was improved with a bank building owned and occupied by the Equitable Trust Company until the appointment of the receiver for the bank. December 7, 1931, Maresh, as receiver, took possession of the property and he and the successor receiver thereafter continued in possession. As to this parcel the intervening petitioners likewise claim that the estate was liable for general taxes for the years 1930, 1931 and 1932. The receiver makes the same contention with reference to the claim as was interposed on the other parcel of land, namely, that the taxes were not ascertainable and could not therefore be allowed as a general claim. What we have said with reference to the claim for taxes on the North property is likewise applicable to this parcel of land. It follows therefore that, in our opinion, the court should have allowed the intervening petition as to 1930 and 1931 taxes.

For the reasons stated, the order of the circuit court relative to the North building is affirmed in so far as it denied the claim of intervening petitioners against the receiver for the reasonable rental of the premises from December 7, 1931, to January 28, 1932, but is reversed as to the balance of the order and the cause remanded with directions that the court allow the intervening petitioners to file their claim for 1930 and 1931 taxes as a general

unexpired estate for years in and to said property, and said Michigan Avenue Trust Company agreed in writing to accept and assume all the terms, covenants and agreements contained in said lease. In February, 1933, Bushman conveyed to said Trust Company, as trustee, the property described in the lease, and later the Michigan Avenue Trust Company sold, assigned and conveyed to the Michigan Avenue Trust Company the unexpired estate for years in and to the property, said Trust Company agreeing in writing to accept and assume all the terms, covenants and agreements contained in the lease. The property was improved with a bank building owned and occupied by the Michigan Avenue Trust Company until the appointment of the receiver for the bank. December 7, 1931, Washburn, as receiver, took possession of the property and he and the successor receiver thereafter continued in possession. As to this period the intervening petitioners likewise claim that the estate was liable for general taxes for the years 1930, 1931 and 1932. The receiver makes the same contention with reference to the claim as was interposed on the other parcel of land, namely, that the taxes were not ascertainable and could not therefore be allowed as a general claim. What we have said with reference to the claim for taxes on the North property is likewise applicable to this parcel of land. It follows therefore that, in our opinion, the court should have allowed the intervening petition as to 1930 and 1931 taxes. For the reasons stated, the order of the circuit court relative to the North building is affirmed in so far as it denied the claim of intervening petitioners against the receiver for the reasonable rental of the premises from December 7, 1931, to January 28, 1932, but is reversed as to the balance of the order and the cause remanded with directions that the court allow the intervening petitioners to file their claim for 1930 and 1931 taxes as a general

claim against the estate.

The order relating to the intervening petition on the bank building is reversed and the cause remanded with directions that the intervening petitioners be allowed to file their claim for 1930 and 1931 taxes, as well as the special assessment, as general claims against the estate.

DECREE AFFIRMED IN PART AND
REVERSED IN PART AND CAUSE
REMANDED WITH DIRECTIONS.

Sullivan, P. J., and Scanlan, J., concur.

claim against the estate.

The order relating to the intervening petition in the

bank building is reversed and the case remanded with directions

that the intervening petitioners be allowed to file their claim

for 1930 and 1931 taxes, as well as the special assessment, as

general claims against the estate.

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JANUARY 10, 1932

Sullivan, P. J., and Connelley, J., concur.

38681

WALTER KROLCZYK,
Appellee,

v.

HERITAGE COAL COMPANY,
Appellant.

397
APPEAL FROM SUPERIOR COURT,
COOK COUNTY.

287 I.A. 619³

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action on the case for personal injuries received in an automobile accident. Trial was had by jury, resulting in a verdict for plaintiff of \$25,000. Defendant's motions for judgment non obstante veredicto and for a new trial were overruled, judgment was entered on the verdict and this appeal followed.

The accident occurred on the afternoon of February 15, 1934. Plaintiff, then forty-three years of age, stepped from an eastbound 22nd street car at Throop street in Chicago. When the car stopped on the west side of Throop street plaintiff got off at the front end of the car and stood to the south and front end thereof. Some four or five passengers got off at the same time. Plaintiff had intended to board a southbound Throop street car coming from 21st street about the same time and, as he stood waiting for the eastbound 22nd street car to pass in front of him before starting across 22nd street, the southbound Throop street car was approaching 22nd street along Throop street. According to plaintiff's testimony he started to cross 22nd street toward the north, looked in all directions and did not see any automobiles in the street at that time. However, defendant's auto-

WALTER KROENKE,
Appellee,

v.

HERITAGE COAL COMPANY,
Appellant.

COOK COUNTY.

287 I.A. 619

MR. JUSTICE FRANK DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action on the case for personal injuries received in an automobile accident. Trial was had by jury, resulting in a verdict for plaintiff of \$5,000. Defendant's motion for judgment non obstante veredicto and for a new trial were overruled, judgment was entered on the verdict and this appeal followed.

The accident occurred on the afternoon of February 15, 1934. Plaintiff, then forty-three years of age, stepped from an eastbound 32nd street car at Throop street in Chicago. When the car stopped on the west side of Throop street plaintiff got off at the front end of the car and stood to the south and front end thereof. Some four or five passengers got off at the same time. Plaintiff had intended to board a northbound Throop street car coming from 31st street about the same time and, as he stood waiting for the eastbound 32nd street car to pass in front of him before starting across 32nd street, the northbound Throop street car was approaching 32nd street along Throop street. According to plaintiff's testimony he started to cross 32nd street toward the north, looked in all directions and did not see any auto-

mobile, which was proceeding in a westerly direction on 22nd street, must have been some distance east of Throop street at the time, but plaintiff's view of it was obstructed by the street car proceeding east on 22nd street. Plaintiff and several other men walked north on the west crosswalk. According to the evidence defendant's truck actually passed the eastbound street car at a point just east of Throop street and struck plaintiff just as he was about to cross the westbound street car track. Plaintiff was thrown in the air, landed on the hood of the truck, was carried some 100 feet to the west before defendant's truck came to a stop, and was severely injured. Defendant's driver claimed that he did not see the plaintiff until the accident happened, that as he passed the front end of the eastbound street car on the west side of Throop street it started to move east, that plaintiff stepped from behind the eastbound street car into the path of his truck, and that his truck was stopped within a few feet after the impact.

It is first urged that plaintiff was guilty of contributory negligence as a matter of law. It is argued that when there is no dispute as to the facts and when all reasonable minds will agree that upon a consideration of the facts the plaintiff's own lack of care contributed to the injury received, then the question of contributory negligence becomes one of law. In determining whether this case comes within that rule it becomes necessary to examine the evidence presented to the jury. A portion of plaintiff's testimony on direct examination is as follows:

"When I got off the street car I was standing, and the street car passed on east. When the street car went east I walked across. Before I started across the street car was about the other side of the Throop street car line. As I started across I looked around, saw nothing coming north; then I started to cross. I looked east and west. I did not see any automobiles in the street at that time. I did not see any street cars in the street at that time. When I started walking north I was standing on the west crosswalk. I was walking at a slow walk. I did not at that time see any automobiles

mobile, which was proceeding in a westerly direction on Third Street, must have been some distance east of Third Street at the time, but Plaintiff's view of it was obstructed by the street car proceeding east on 22nd Street. Plaintiff and several other men walked north on the west crosswalk. According to the evidence defendant's truck actually passed the eastbound street car at a point just east of Third Street and struck Plaintiff just as he was about to cross the westbound street car track. Plaintiff was thrown in the air, landed on the hood of the truck, was carried some 100 feet to the west before defendant's truck came to a stop, and was severely injured. Defendant's driver claimed that he did not see the Plaintiff until the accident happened, that as he passed the front end of the eastbound street car on the west side of Third Street it started to move east, that Plaintiff stepped from behind the eastbound street car into the path of his truck, and that his truck was stopped within a few feet after the impact.

It is first urged that Plaintiff was guilty of contributory negligence as a matter of law. It is argued that when there is no dispute as to the facts and when all reasonable minds will agree that upon a consideration of the facts the Plaintiff's own lack of care contributed to the injury received, then the question of contributory negligence becomes one of law. In determining whether this case comes within that rule it becomes necessary to examine the evidence presented to the jury. A portion of Plaintiff's testimony on direct examination is as follows:

"When I got off the street car I was standing, and the street car passed on east. When the street car went east I walked across. Before I started across the street car was about the other side of the Third Street car line. As I started across I looked around, saw nothing coming north; then I started to cross. I looked back and west. I did not see any automobiles in the street at that time. I did not see any street cars in the street at that time. When I started walking north I was standing on the west crosswalk. I was walking at a slow walk. I did not at that time see any automobiles

coming, did not hear any horns blow or any sounds of any kind of an automobile. I remember when I started to cross the street North, then I don't know know nothing about it. I don't know whether anything hit me."

On cross-examination plaintiff testified:

"While I stood there and before the street car that I had just got off from had moved on I looked to the east. * * * I looked to the west back of the street car and did not see anything coming. I could see about a block or two. There was no traffic, no automobiles or any other street cars coming west on 22nd street. I looked to the east in which direction the street car I got off from was going. I looked to the east about two or three blocks and in that two or three blocks I did not see any automobiles coming toward me. * * * I stood there and the street car moved on past me. I stood still out there in the center of 22nd street on the west side of Throop street and stood there until the street car went on east. The street car passed to the east side of the Throop street car line, went across the street car tracks when I started to walk slowly north across on the west side of Throop street. I wasn't in a hurry because I had plenty of time. * * * After the eastbound 22nd Street car had got by me I looked to the east again. I walked across the east bound car tracks first and I walked onto the westbound 22nd street car tracks. * * * When I looked to the east I was still standing, after the street car had gone past me and got over past the street car tracks of Throop I started across. Before I started across I looked again to the east. * * * Well, I remember when I started, to begin to start walking I looked around and then after I don't know what was happened."

Marion Swlontnicki, who was on the front platform of the southbound Throop street car at the time of the accident, testified on behalf of plaintiff, stating that he saw defendant's truck coming east of Throop street on 22nd street -

"speeding about the rate of thirty-five or forty or better. It was hugging the right, north side rail. When I first saw it I judge it was about three or four hundred feet east of Throop street. There were no other automobiles going east at that time. I saw a 22nd street car passing east on 22nd. It was crossing east before our car came to a stop. * * * At the time I noticed the Ford truck three or four hundred feet to the east, the 22nd street car was crossing in front of me rattling across the Throop street rails, going about ten miles an hour. * * * I watched the Ford. Eventually the Ford car down a block away and the street car came alongside of each other and passed each other about twenty-five feet east. * * * When the man got hit by the Ford he was walking slowly. The two other men were walking behind him about three feet. The Ford came along still straddling the west-bound rail, did not swerve to the right or left, going straight along at forty miles an hour."

Joseph Stark, a resident of Pierce, Idaho, was brought here to testify on behalf of plaintiff. He had been a passenger on the eastbound street car with plaintiff, and had alighted from the front

coming, did not hear any horns blow or any sounds of any kind of an automobile. I remember when I started to cross the street North, then I don't know anything about it. I don't know whether anything hit me."

On cross-examination plaintiff testified:

"While I stood there and before the street car hit I had just got off from having moved on I looked to the east. * * I looked to the west back of the street car and did not see anything coming. I could see about a block or two. There was no traffic, no automobiles or any other street cars coming west on 22nd street. I looked to the east in which direction the street car I got off from was going. I looked to the east about two or three blocks and in that two or three blocks I did not see any automobiles coming toward me. * * I stood there and the street car moved on past me. I stood still and there in the center of 22nd street on the west side of Throop street and stood there until the street car went on east. The street car passed to the east side of the Throop street car line, went across the street car tracks when I started to walk slowly north across on the west side of Throop street. I wasn't in a hurry because I had plenty of time. * * After the eastbound 22nd street car had got by me I looked to the east again. I walked across the east bound car tracks first and I walked onto the westbound 22nd street car in line. * * Then I looked to the east I was still standing, after the street car had gone past me and not over half the street car tracks of Throop I started across. Before I started across I looked again to the east. * * Well, I remember when I started, to begin to start walking I looked around and then after I don't know what happened."

Maxton Galenichnik, who was on the front platform of the southbound Throop street car at the time of the accident, testified on behalf of plaintiff, stating that he saw defendant's truck coming east of Throop street on 22nd street -

"Speeding about the rate of thirty-five or forty or better. It was heading the right, north side well. When I first saw it I judge it was about three or four hundred feet east of Throop street. There were no other automobiles coming east at that time. I saw a 22nd street car passing east on 22nd. It was crossing east before our car came to a stop. * * At the time I stopped the Ford truck three or four hundred feet to the east, the 22nd street car was crossing in front of me traveling across the Throop street rails, going about ten miles an hour. * * I walked the Ford. Eventually the Ford car came a block away and the street car came alongside of each other and passed each other about twenty-five feet east. * * The man got hit by the Ford. He was walking slowly. The Ford came along, still traveling the west-bound three feet. The Ford came along, still traveling the west-bound rail, did not swerve to the right or left, going straight along at forty miles an hour."

Joseph Stark, a resident of Detroit, Idaho, was present at the time to testify on behalf of plaintiff. He had been a passenger in the eastbound street car with plaintiff, and had alighted from the street

end of the car with plaintiff, intending to take the southbound Throop street car. He also waited with plaintiff for the eastbound car to go by, and after the car had proceeded east he walked about three or four feet behind plaintiff in a northerly direction on the crosswalk. Stark evidently had the same means of observation as did plaintiff. He testified as follows:

"The street car had gotten about seventy-five or a hundred feet east before Krolozyk started to go north across the street car tracks. Krolozyk was about on the rail of the westbound tracks. When I started across I looked east. I seen the street car that passed and went down east. There was no automobiles there. Krolozyk was walking a natural gait and I was walking behind him. The first that I saw the westbound automobile that struck Krolozyk was when it was about to strike him. I jumped back when he was about to strike him because he didn't blow no horn. I was about to be struck and I moved back. The automobile was going about thirty-five or forty miles an hour. * * * The automobile stopped about a hundred feet west of the crosswalk where Mr. Krolozyk was struck."

On cross-examination Stark testified as follows:

"The street car that we got off from moved on clear across Throop street and went on its way east. After the 22nd street car passed up, Krolozyk moved to the north across 22nd street. I was the next one. At that time the 22nd street car had gone on about a hundred feet or more past Throop street east. It was way across Throop street and was on down the line. As I started to walk across I looked to the east."

Casimir Ulanski, who was riding on the southbound Throop street car, testified that defendant's truck was proceeding in a westerly direction across Throop street at the rate of about 35 or 40 miles an hour. Chester Moony, another passenger on this same car, testified that he had been driving automobiles for about six years and judged the speed of defendant's truck as between 35 and 40 miles an hour.

Plaintiff's case was tried on the theory that he did everything that a vigilant man could have done under the circumstances to look out for danger; that instead of crossing the street car track in front of the car from which he had alighted he carefully waited until the street car had passed before him, although he saw the car he intended to take approaching 22nd street from the north;

end of the car with plaintiff, intending to take the car around
Thompson street car. He also waited with plaintiff for the eastbound
car to go by, and after the car had proceeded what he called about
three or four feet behind plaintiff in a westerly direction on the
crosswalk. Stark evidently had the same view of observation as
did plaintiff. He testified as follows:

"The street car had gotten about twenty-five or a hundred
feet east before Krolezyk started to go north across the street
car tracks. Krolezyk was about on the tail of the westbound truck.
When I started across I looked east. I saw the street car that
passed and went down east. There was no automobile there. Krolezyk
was walking a natural gait and I was walking behind him. The first
that I saw the westbound automobile that struck Krolezyk was when it
was about to strike him. I jumped back when he was about to strike
him because he didn't blow no horn. I was about to be struck and I
moved back. The automobile was going about thirty-five or forty
miles an hour. * * * The automobile stopped about a hundred feet
west of the crosswalk where Mr. Krolezyk was struck."

On cross-examination Stark testified as follows:
"The street car that we got off from moved on down across
Thompson street and went on its way east. After the third street car
passed up, Krolezyk moved to the north across Third street. I was
the next one. At that time the third street car had gone on about
hundred feet or more past Thompson street east. It was very close
Thompson street and was on down the line. As I started to walk across
I looked to the east."

Gastimir Ulanaki, who was riding on the southbound Thompson
street car, testified that defendant's truck was proceeding in a
westerly direction across Thompson street at the rate of about 35 or
40 miles an hour. Chester Leony, another passenger on this same
car, testified that he had been driving and noticed for about six
years and judged the speed of defendant's truck as between 35 and
40 miles an hour.

Plaintiff's case was tried on the theory that he did over-
thing that a vigilant man could have done under the circumstances
to look out for danger; that instead of crossing the street car
track in front of the car from which he had alighted he correctly
waited until the street car had passed before him. Although he saw
the car he intended to take approaching Third street from the north;

that as he and other men stood there waiting for the eastbound car to go by he looked to the east and before starting to walk north he again looked to the east and the west and saw nothing coming; that he walked slowly north until he was struck. His testimony is corroborated by that of other witnesses who stated that defendant's truck was proceeding west at a high rate of speed over an intersection of street car tracks without sounding any warning, and that the accident was caused through the negligence of defendant's driver and in spite of the caution exercised by plaintiff. From the picture drawn by plaintiff's witnesses it is probable that the eastbound street car from which plaintiff had alighted obscured the view of defendant's truck, because Stark, who was in approximately the same position as plaintiff, stated that he also looked to the east and saw no automobile approaching.

Defendant sought to show by its witnesses that plaintiff was guilty of contributory negligence. One Whittington testified on behalf of defendant that he had been driving an automobile in a westerly direction following defendant's truck at a distance of about 20 or 30 feet; that -

"The street car and Ralph Heritage passed each other just west of the crossing of Throop. * * * I saw the Heritage car passing the street car and I saw a body strike the front end of the hood of the car and the left front fender. That person came approximately from nowhere. He was at the back end of the street car. * * * As the Heritage truck was crossing the west crosswalk of Throop street it was going probably ten or twelve miles an hour. * * * I crossed over Throop street about five miles an hour and that's the same speed the Ford truck was going approximately. I kept thirty feet behind it. The 22nd street eastbound street car was stopped. I did not see any passengers getting on or off at any time. * * * At the time the rear end of the eastbound street car got to the west crosswalk the Ford truck had already stopped about sixty feet west of the Throop street crossing."

It was shown, however, that on the day of the accident Whittington made the following statement to the police:

"I was driving west on 22nd street and there was Ford car ahead of me, about 125 to 150 yards ahead, going west also, when this Ford car passed the Throop street intersection I heard the screech of brakes, and somebody holler, then the car stopped, then

that as he and other men stood there waiting for the eastbound car to go by he looked to the east and before starting to walk north he again looked to the east and the west and saw nothing coming; that he walked slowly north until he was struck. His testimony is corroborated by that of other witnesses who stated that defendant's truck was proceeding west at a high rate of speed over an intersection of street car tracks without sounding any warning, and that the accident was caused through the negligence of defendant's driver and in spite of the caution exercised by plaintiff. From the picture drawn by plaintiff's witnesses it is probable that the eastbound street car from which plaintiff had alighted obscured the view of defendant's truck, because Stark, who was in approximately the same position as plaintiff, stated that he also looked to the east and saw no automobile approaching.

Defendant sought to show by its witnesses that plaintiff was guilty of contributory negligence. One testimony testified on behalf of defendant that he had been driving an automobile in a westerly direction following defendant's truck at a distance of about 20 or 30 feet; that -

"The street car and Ralph Heritage passed each other just west of the corner of Throop. * * * I saw the Heritage car passing the street car and I saw a boy strike the front end of the hood of the car and the left front fender. That person came approximately from nowhere. He was at the back end of the street car. * * * As the Heritage truck was crossing the west crosswalk of Throop street it was going probably ten or twelve miles an hour. * * * I crossed over Throop street about five miles an hour and that's the same speed the Ford truck was going approximately. I kept thirty feet behind it. The Ford street eastbound street car was stopped. I did not see any passengers getting in or off at any time. At the time the rear end of the eastbound street car got to the west crosswalk the Ford truck had already stopped about thirty feet west of the Throop street crossing."

It was shown, however, that on the day of the accident plaintiff made the following statement to the police:

"I was driving west on 2nd street and there was Ford car ahead of me, about 125 to 150 yards ahead, and west also, when the Ford car passed the Throop street intersection I heard the screech of brakes, and somebody holler, then the car stopped, then

and I was pulling near the car, I saw a man lying in the street."

Subsequently, on February 23, 1934, Whittington also signed the following written statement:

"There had been an eastbound street car at the intersection but had pulled out and gone east before I reached the intersection or just as I was pulling up to the intersection. * * *

As I reached the intersection I could see an accident had happened and I heard brakes screech and a man scream or somebody scream. I saw this Ford truck ahead of me come to a stop; and I saw a body in the street ahead of the car.

I had been about one hundred yards to the rear of this car most of the time since the car had passed me and it had been riding on the westbound street car track. * * *

Prior to the accident I did not see any pedestrians in the street at all at any time and I did not see the Ford truck strike Mr. Krolezyk. I did not see him before he was struck and afterwards until the Ford car stopped."

From the foregoing contradictory statements it is apparent that the jury could not have placed much reliance upon the testimony of Whittington.

Ralph Heritage, who drove defendant's truck, testified as follows:

"As I came up to Throop street I saw a street car standing still on the southwest corner. At that time I was just coming up to Throop street. I slackened down to around five or eight miles an hour. * * * The street car started up about the time I was at the front end of it. * * * As I got to the rear end of the street car a man seemingly ran in front of me and I swerved and stopped as soon as I could. This man came out from the back end of the street car. * * * The actual accident took place around sixty feet west of the west crosswalk of Throop street on 22nd street. * * * At the time I first saw the plaintiff he came from in back of the street car."

It likewise appears that on the date of the accident Heritage made a written statement to the police of the city of Chicago to the following effect:

"I was driving my Ford car, Illinois license #419-702 year 1933, west on 22nd street, and I had just about passed Throop St. intersection when a man came from behind large red truck going east on 22nd street and dashed out in front of my car and I struck him. * * *

Q. How fast were you driving the car when you hit the man?
A. About 25 or 30 miles an hour."

From the foregoing evidence it is apparent that the questions of negligence and contributory negligence became questions of fact for the jury, and not questions of law as defendant contends. If,

and I was pulling near the car, I saw a man lying in the street."

Subsequently, on February 22, 1934, Whittington also stated the

following written statement:

"There had been an accident at the intersection but had pulled out and gone east before I reached the intersection or just as I was pulling up to the intersection. * * * As I reached the intersection I could see an accident had happened and I heard brakes screech and a man scream or somebody scream. I saw this Ford truck ahead of me come to a stop and I saw a body in the street ahead of the car. I had been about one hundred yards to the rear of this car most of the time since the car had passed me and it had been riding on the westbound street car track. * * * Prior to the accident I did not see any person in the street at all at any time and I did not see the Ford truck strike Mr. Kirolosky. I did not see him before he was struck and I did not see the Ford car stopped."

From the foregoing contradictory statements it is apparent that the

jury could not have placed much reliance upon the testimony of

Whittington.

Ralph Heritage, who drove defendant's truck, testified as

follows:

"As I came up to Third street I saw a street car standing still on the southeast corner. At that time I was just starting up to Third street. I reached down to around five or eight miles an hour. * * * The street car started up about the time I was at the front end of it. * * * As I got to the rear end of the street car a man seemingly ran in front of me and I swerved and stopped as soon as I could. This man came out from the back end of the street car. * * * The actual accident took place about fifty feet west of the west corner of Third street on 32nd street. * * * At the time I first saw the plaintiff he came from in back of the street car."

It likewise appears that on the date of the accident Whittington made

a written statement to the police of the city of Chicago to the

following effect:

"I was driving my Ford car, Illinois license M19-723 year 1933, west on Third street, and I had just about passed Third street. I saw a man come from behind being hit by a truck going east on 32nd street and dashed out in front of my car and I struck him. * * * How fast were you driving the car when you hit the man? A. About 25 or 30 miles an hour."

From the foregoing evidence it is apparent that the questions

of negligence and contributory negligence become questions of fact

for the jury, and not questions of law as defendant contends. It,

as plaintiff and his witnesses stated, he took the precaution of allowing the eastbound street car to proceed ahead of him, looked in both directions and then proceeded cautiously across 22nd street, as the jury evidently believed he did, and that defendant's car, proceeding west on 22nd street at the intersection of two street car lines, and without any warning, passed the eastbound street car at an excessive rate of speed, then the jury was justified in finding as a matter of fact that plaintiff was not guilty of contributory negligence and that the injury was caused by the carelessness of defendant's driver. The jury had a right to take into account the credibility of various witnesses and all the circumstances leading up to and attending the accident. The issues of fact as to whether the accident was caused by defendant's negligence alone, or whether plaintiff by his conduct also contributed to ^{the} injury, were squarely placed before the jury and determined adversely to defendant. From a careful examination of the record, we believe the case was fairly tried and that the verdict is not at all contrary to the manifest weight of the evidence.

The only other point urged as ground for reversal relates to the admission of evidence relative to the speed of defendant's automobile. Paul Tetzke, a witness for plaintiff, was asked to give his opinion as to the speed of defendant's car and testified:

"I would be able to judge the speed of a moving automobile at a distance. I might be able to partly form an opinion as to the speed that automobile was traveling. It wouldn't be safe or sure."

Thereupon the following transpired:

"Q. Well, what is your best judgment as to the speed of that car?"

Mr. Crowe: That I object to in view of the witness' qualification. It would be purely conjectural and surmise on his part, and he so admits frankly that he couldn't tell.

The Court: Overruled.

A. I should judge about forty miles an hour."

Later in the trial plaintiff's counsel made the following statement to the court:

as plaintiff and his witnesses stated, he took the present on of allowing the eastbound street car to proceed ahead of him, looked in both directions and then proceeded cautiously across 32nd street, as the jury evidently believed he did, and that defendant's car, proceeding west on 32nd street at the intersection of two streets, passed the eastbound street car at an excessive rate of speed, then the jury was justified in finding as a matter of fact that plaintiff was not guilty of contributory negligence and that the injury was caused by the negligence of defendant's driver. The jury had a right to take into account the credibility of various witnesses and all the circumstances leading up to and attending the accident. The issue of fact as to whether the accident was caused by defendant's negligence alone, or whether plaintiff by his conduct also contributed to ^{the} injury, was specially placed before the jury and determined adversely to defendant. From a careful examination of the record, we believe the case was fairly tried and that the verdict is not at all contrary to the manifest weight of the evidence.

The only other point urged as ground for reversal relates to the admission of evidence relative to the speed of defendant's automobile. Paul Totaka, a witness for plaintiff, was asked to give his opinion as to the speed of defendant's car and testified: "I would be able to judge the speed of a moving automobile at a distance. I might be able to partly form an opinion as to the speed that automobile was traveling. It wouldn't be safe or sure."

Thereupon the following transpired:

"Q. Well, what is your best judgment as to the speed of that car?"
 A. I should judge about forty miles an hour.
 The Court: Overruled.
 His part, and he so admits frankly that he couldn't tell.
 Mr. Grower: That I object to in view of the witness' qualification. It tends to unfairly assist and influence on that case.

Later in the trial plaintiff's counsel made the following statement to the court:

"Mr. Irwin: I read over part of the record of the street car motorman's [Totzke] testimony. Mr. Crowe made objection to the witness testifying as to the speed of the automobile. Your Honor, I will withdraw it. Strike out that question and answer. The Court: I think you are much more apt to put error in the situation than at the first time."

The record discloses that the testimony of the witness Totzke was thereupon stricken and the court instructed the jury to disregard it. It is argued that this constituted error. Inasmuch as the testimony which was thus stricken was merely cumulative, it would not in our opinion constitute reversible error. It was abundantly shown by other competent evidence that defendant's truck at the time of the occurrence was going 35 to 40 miles an hour, and therefore the stricken testimony could not have affected the verdict of the jury.

The case was fairly tried. No complaint is made as to the instructions or the size of the verdict. In view of our conclusions on the main point of the case, namely, that the question of contributory negligence became one of fact, which was submitted to the jury under proper instructions, and not one of law, and that the verdict is not contrary to the manifest weight of the evidence, the judgment should be affirmed and it is so ordered.

JUDGMENT AFFIRMED.

Sullivan, P. J., and Scanlan, J., concur.

"Mr. Twiss: I read over part of the record of this case
and Mr. Twiss's [Twiss's] testimony. Mr. Twiss made objection to
the witness testifying as to the speed of the automobile. Now,
however, I will withdraw it. Unlike one that question and answer.
The Court: I think you are going to put error
in the situation than at the first time."

The record discloses that the testimony of Mr. Twiss was
thereupon stricken and the court instructed the jury to disregard
it. It is argued that this constituted error. Inasmuch as the
testimony which was thus stricken was merely cumulative, it would
not in our opinion constitute reversible error. It was abundantly
shown by other competent evidence that defendant's car at the
time of the occurrence was going at 40 miles an hour, and
therefore the stricken testimony could not have affected the
verdict of the jury.

The case was fairly tried. No complaint is made as to
the instructions or the aids of the verdict. In view of our con-
clusions on the main point of the case, namely, that the question
of contributory negligence becomes one of fact, which was submitted
to the jury under proper instructions, and not one of law, and that
the verdict is not contrary to the manifest intent of the vi-
dence, the judgment should be affirmed and it is so ordered.

JUDGES: TWISS, J.

Twiss, P. J., and Twiss, J., concur.

38701

40 #

PEOPLE OF THE STATE OF ILLINOIS
ex rel. BIAGGIO MARTINO,
Appellee,

v.

CITY OF BLUE ISLAND et al.,
Appellants.

APPEAL FROM SUPERIOR
COURT, COOK COUNTY.

287 I.A. 620¹

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

The City of Blue Island appealed from a judgment order of the superior court entered October 11, 1935, directing that a writ of mandamus issue requiring the city and its officials to reinstate the relator, Biaggio Martino, to his position as an unskilled laborer in the department of public works of the City of Blue Island, to enter his name on the payroll, appropriate moneys, pay relator from June 14, 1933, at the rate of \$540 a year, and by the same order the court also entered judgment against respondents for \$1,200.

The original petition for mandamus was filed February 27, 1934, and a general demurrer thereto was sustained. Thereafter an amended petition was filed April 9, 1934, and a general and special demurrer thereto was likewise sustained. June 25, 1934, a second amended petition was filed. Respondents interposed a general and special demurrer, which was overruled, whereupon respondents elected to stand by their demurrer and the order for mandamus followed.

The second amended petition alleged that the City of Blue Island had adopted the provisions of "An act to Regulate Civil Service in Cities," and that the civil service act had been in effect in Blue Island for some five years; that the relator,

PEOPLE OF THE STATE OF ILLINOIS
ex rel. RIGGIO MARTINO,
Appellee,

v.

CITY OF BLUE ISLAND et al.,
Appellants.

APPEAL FROM JUDGMENT

COURT, COOK COUNTY.

3871.A.620

MR. JUSTICE FRANK DELIVERED THE OPINION ON THE 20TH.

The City of Blue Island appealed from a judgment order of the superior court entered October 11, 1933, directing that a writ of mandamus issue requiring the city and its officials to restate the relator, Riggio Martino, to his position as an unskilled laborer in the department of public works of the City of Blue Island, to enter his name on the payroll, appropriate money, pay relator from June 14, 1933, at the rate of \$240 a year, and by the same order the court also entered judgment against respondents for \$1,200.

The original petition for mandamus was filed February 27, 1934, and a general demurrer thereto was sustained. Thereafter an amended petition was filed April 9, 1934, and a general and special demurrer thereto was likewise sustained. June 15, 1934, a second amended petition was filed. Respondents interposed a general and special demurrer, which was overruled, whereupon respondents elected to stand by their demurrer and the order for mandamus followed.

The second amended petition alleged that the City of Blue Island had adopted the provisions of "An act to regulate Civil Service in Cities," and that the civil service act had been

Biaggio Martino, was a civil service employee of the city, being an unskilled laborer in the department of public works and classified under "Unskilled Labor - Class F - Grade 1." It was further alleged that in the month of May, 1933, relator was discharged by one Barney Hammond, Superintendent of Public Works, "without cause or charges being preferred against him, said discharge being for political reasons only;" that Martino had performed his duties and is ready, willing and able to continue so to do, but has been refused his position without cause; that the city has provided for said position at the rate of \$540 a year in its annual appropriation bill for the year 1932 and succeeding years; that at a meeting of the civil service commission held June 10, 1933, the commission notified the superintendent of public works to appear before the commission June 14, 1933, relative to the reinstatement of relator; that at said meeting the commission asked the superintendent of public works to state his reasons for discharging relator and why no charges were filed, to which the superintendent replied that he did not know he had to notify the commission and that the relator was discharged on order from an alderman for political reasons. It is alleged that the commission thereupon ordered the relator to be reinstated to his position, with pay from June 1 to June 15, 1933, "inasmuch as no charges were filed or the Commission notified, and that his discharge was contrary to the Civil Service Laws;" that the superintendent of public works was thereupon notified of the action taken by the commission but has failed to reinstate and employ the relator; that respondents have assigned others to perform the duties of the relator and are paying them the salary which rightfully belongs to him.

It is first urged as ground for reversal that the relator was properly and legally discharged and that the order of reinstatement issued by the commission was unauthorized and void. The right of persons appointed under the civil service act in cities not to be

Blasie Martine, was a civil service employee of the city, being an unskilled laborer in the department of Public Works and classified under "Unskilled Labor - Class X - Grade I." It was further alleged that in the month of May, 1933, the city was advised by one Barney Hammond, Superintendent of Public Works, "without cause or charge being preferred against him, and without being given for political reasons only;" that Martine had performed his duties and was ready, willing and able to continue to do so, but had been removed from his position without cause; that the city has provided for said position at the rate of \$240 a year in its annual appropriation bill for the year 1932 and succeeding years; that at a meeting of the civil service commission held June 10, 1933, the commission notified the Superintendent of Public Works to appear before the commission June 14, 1933, relative to the reinstatement of Martine; that at said meeting the commission asked the Superintendent of Public Works to state his reasons for discharging Martine and why no charges were filed, to which the Superintendent replied that he did not know he had to notify the commission and that the Mayor was requested to order from an Alderman for political reasons. It is alleged that the commission thereupon ordered the Mayor to be reinstated to his position, with pay from June 1 to June 10, 1933, "inasmuch as no charges were filed or the Commission notified, and that his discharge was contrary to the Civil Service Law;" that the Superintendent of Public Works was thereupon notified of the action taken by the commission but has failed to reinstate and employ the Mayor; that respondents have assigned others to perform the duties of the Mayor and are paying them the salary which rightfully belongs to him. It is first urged as ground for reversal that the Mayor was properly and legally discharged and that the order of reinstatement issued by the commission was unauthorized and void. The right

discharged except for cause and upon written charges and after an opportunity to be heard in his own defense is based upon section 12 of "An Act to Regulate the Civil Service of Cities," (Illinois State Bar Stats., 1935, chap. 24, sec. 12, par. 697) which contains the following provision:

"Excepting as hereinafter provided in this section, no officer or employee in the classified civil service of any city, who shall have been appointed under said rules and after said examination, shall be removed or discharged except for cause, upon written charges and after an opportunity to be heard in his own defense. Such charges shall be investigated by or before said civil service commission, or by or before some officer or board appointed by said commission, to conduct such investigation. The finding and decision of such commission or investigating officer or board, when approved by said commission, shall be certified to the appointing officer, and shall be forthwith enforced by such officer. Nothing in this act shall limit the power of any officer to suspend a subordinate for a reasonable period, not exceeding thirty days. In the course of an investigation of charges each member of the commission, and of any board so appointed by it, and any officer so appointed shall have the power to administer oaths and shall have power to secure by its subpoena both the attendance and testimony of witnesses, and the production of books and papers relevant to such investigation. Nothing in this section shall be construed to require such charges or investigation in cases of laborers or persons having the custody of public money, for the safe-keeping of which another person has given bonds." (Italics ours.)

By the express provisions of the last sentence of this section the benefits of the act are not extended to laborers or to persons having the custody of public money for the safe-keeping of which another person has given bonds. It is argued that the petition of relator, a common laborer, is based upon the allegation that he was discharged for political reasons and without charges being preferred against him and that under the provisions of section 12 relator could be discharged by his appointing officer without cause and for any reason which the appointing officer deems sufficient, or for no reason.

This section was considered in the case of City of Chicago v. Southern Surety Co., 239 Ill. App. 628, in relation to the case of a civil service employee having the custody of public money, and we there held that the effect of the opinion in People v. Loeffler, 175 Ill. 585, is that -

"As to the manner of appointment in the office of the

discharged except for cause and upon written charges and after an opportunity to be heard in his own defense is based upon section 12 of "An Act to Regulate the Civil Service of Cities," (Illinois State Bar Association, 1935, chap. 24, sec. 12, par. 697) which contains the following provisions:

"Excepting an investigator provided in this section, no officer or employee in the classified civil service of any city, who shall have been appointed under said rules and after said examination, shall be removed or discharged except for cause, upon written charges and after an opportunity to be heard in his own defense. Such charges shall be investigated by or before said civil service commission, or by or before some officer or board appointed by said commission, to conduct such investigation. The finding and decision of such commission or investigating officer or board, when approved by said commission, shall be certified to the appointing officer, and shall be forthwith enforced by such officer. Nothing in this act shall limit the power of any officer to suspend a subordinate for a reasonable period, not exceeding thirty days. In the course of an investigation of charges such member of the commission, and of any board so appointed by it, and any officer so appointed shall have the power to administer oaths and shall have power to secure by its subpoena both the attendance and testimony of witnesses, and the production of books and papers relevant to such investigation. Nothing in this section shall be construed to require such charges or investigation in the case of removal or discharge of any officer or employee, for the cause of incompetency. Having the custody of public money, for the cause of incompetency, another person has given bonds." (Illinois Code.)

By the express provisions of the last sentence of this section the benefits of the act are not extended to a person or to persons having the custody of public money for the cause of incompetency. It is argued that the decision of another person has given bonds. It is argued that the decision of a common laborer, is based upon the allegation that he was discharged for political reasons and without charges being preferred against him and that under the provisions of section 12 a laborer could be discharged by his appointing officer without cause and for any reason which the appointing officer deems sufficient, or for no reason. This section was considered in the case of City of Chicago v. Northern Trust Co., 230 Ill. App. 633, in relation to the case of a civil service employee having the custody of public money, and we there held that the effect of the opinion in People v. Louisville, 175 Ill. 585, is that -

"As to the manner of appointment in the office of the

collector, the provisions of Section 22 of the Cities and Villages Act have been modified by the provisions of the Civil Service Act, so that while the City Collector has the power to name his Clerks and Subordinates, he is limited in the naming of them to the persons whose names appear on the Civil Service list. However, as to the removal of any employee for whose fidelity he has been required to give bond, his power is arbitrary and absolute; he can remove such employee at his pleasure."

The proviso of section 12, excluding from the benefits of the act persons having the custody of public money, also excludes "laborers," and under the authority of the Loeffler case and City of Chicago v. Southern Surety Co., supra, the superintendent of public works of Blue Island had arbitrary power to discharge the relator without the right of interference by the civil service commission. The commission in the proceeding in the instant case was attempting to override the statutory authority of the superintendent of public works by setting aside his order of discharge, and under the statute it has no such authority. In the case of laborers employed by cities the only authority which the commission has is to examine applicants for vacancies and to certify for appointment those who meet the requirements, but the commission is devoid of any power to remove or discharge such a laborer after his appointment. The validity and constitutionality of this section was upheld in the case of People ex rel. Reilly v. City of Chicago, 337 Ill. 100, wherein the Supreme court held that section 12 of the civil service act relating to cities, and excepting laborers from the right of a hearing before they are discharged from any employment, does not violate the due process clause of the state and federal constitutions, inasmuch as a laborer under the statute has no property right in the particular position that he occupies and is not deprived of his right to sell his labor and to receive compensation therefor.

It appears from the minutes of the meeting of the civil service commission, held June 14, 1933, at which the commission ordered Martino reinstated, that the superintendent of public works

collector, the provisions of Section 22 of the Cities and Villages Act have been modified by the provisions of the Civil Service Act, so that while the City Collector has the power to name his clerks and subordinates, he is limited in the number of them to the number whose names appear on the Civil Service list. However, as to the removal of any employee for cause, it is clearly he has been required to give bond, his power is arbitrary and absolute; he can remove such employee at his pleasure."

The provision of section 12, extending from the benefits of the act to persons having the custody of public money, also excludes "laborers," and under the authority of the People ex rel. City of Chicago v. Board of Public Works, the superintendent of the public works of the City of Chicago had authority to discharge the laborers without the right of interference by the civil service commission. The commission in the proceeding in the instant case was attempting to override the statutory authority of the superintendent of public works by setting aside his order of discharge, and under the statute it has no such authority. In the case of laborers employed by cities the only authority which the commission has is to examine applicants for vacancies and to certify for appointment those who meet the requirements, but the commission is devoid of any power to remove or discharge such a laborer after his appointment. The validity and constitutionality of this section was upheld in the case of People ex rel. City of Chicago v. Board of Public Works, 337 Ill. 100, wherein the Supreme Court held that section 12 of the Civil Service Act relating to cities, and excluding laborers from the right of a hearing before they are discharged from any employment, does not violate the due process clause of the state and federal constitutions, inasmuch as a laborer under the statute has no property right in the particular position that he occupies and is not deprived of his right to sell his labor and to receive compensation therefor.

It appears from the minutes of the meeting of the civil service commission, held June 14, 1933, at which the commission ordered Martin reinstated, that the superintendent of public works

was asked to state the reasons for Martino's discharge and why charges were not preferred against him, to which the superintendant replied that he did not know he was required to notify the commission and that Martino was discharged for political reasons. It appears from the minutes that the commission thereupon ordered the relator, as an unskilled laborer, to be reinstated to his position, "inasmuch as no charges were filed or the commission notified and that his discharge was contrary to the civil service laws." The ground for the reinstatement is thus stated in the minutes of the meeting and appears in the pleadings upon which the cause was determined. Counsel for the relator argues that the allegations of the second amended petition present a new point not heretofore determined in this state. It is conceded, of course, that the appellate court in City of Chicago v. Southern Surety Co., and the Supreme court in People v. Loeffler and People ex rel. Reilly v. City of Chicago, supra, had this provision under consideration in the case of civil service employees who are excluded from the benefits of the provisions of section 12, but it is urged that section 12 imposes three requirements for a valid discharge, namely, (1) cause, (2) written charges, and (3) an opportunity to be heard in his own defense, and that these must coexist in the case of removal of all officers or employees under the classified civil service; that all these requirements are necessary except as the same are modified, with respect to laborers, in the last sentence, which does not, however, exclude that class from the protection offered by the first sentence but merely reduces the number of requirements from three to two; that while the laborer may be removed without written charges, there is no authority under the law for his removal without cause. However, in the instant case the cause of relator's removal was stated by the superintendent of public works, and whether that cause was good or not was immaterial, since under the authority

was asked to state the reasons for Martin's discharge and why charges were not preferred against him, to which the respondent replied that he did not know he was required to notify the commission and that Martin was discharged for political reasons. It appears from the minutes that the commission thereupon ordered the relator, as an unskilled laborer, to be reinstated to his position, "inasmuch as no charges were filed or the commission notified and that his discharge was contrary to the civil service laws." The ground for the reinstatement is thus stated in the minutes of the meeting and appears in the pleadings upon which the cause was determined. Counsel for the relator argues that the allegations of the second amended petition present a new point not heretofore determined in this state. It is conceded, of course, that the appellate court in City of Chicago v. Southern Surety Co., and the Supreme court in People v. Iselizer and People ex rel. Kelly v. City of Chicago, supra, had this provision under consideration in the case of civil service employees who are excluded from the benefits of the provisions of section 12, but it is urged that section 12 imposes three requirements for a valid discharge, namely, (1) cause, (2) written charges, and (3) an opportunity to be heard in his own defense, and that these must coexist in the case of removal of all officers or employees under the classified civil service; that all these requirements are necessary except as the same are modified, with respect to laborers, in the last sentence, which does not, however, exclude that class from the protection afforded by the first sentence but merely reduces the number of requirements from three to two; that while the laborer may be removed without written charges, there is no authority under the law for his removal without cause. However, in the instant case the cause of relator's removal was stated by the superintendent of public works, and whether that cause was good or not was in issue, since under the authority

of City of Chicago v. Southern Surety Co., supra, the superintendent had the right to remove relator "at his pleasure." It was evidently the intent of the legislature that laborers could be removed for any cause and without written charges being preferred against them or an opportunity to be heard in their own defense, and the courts have given effect to this legislative intent by decisions construing the act and upholding the constitutionality thereof. If the act is bad the remedy lies with the legislature, and not with the courts.

Other grounds are also urged for reversal, including the defense of laches, but in view of the conclusion reached upon the main question in the case we deem it unnecessary to consider them.

For the reasons stated the judgment of the Superior court should be reversed, and it is so ordered.

JUDGMENT REVERSED.

Sullivan, P. J., and Scanlan, J., concur.

of City of Chicago v. Southern Railway Co., supra, the superintendent had the right to remove a laborer "at his pleasure." It was evidently the intent of the legislature that laborers could be removed for any cause and without written charges being preferred against them or an opportunity to be heard in their own defense, and the courts have given effect to this legislative intent by decisions construing the act and upholding the constitutionality thereof. If the act is bad the remedy lies with the legislature and not with the courts.

Other grounds are also urged for reversal, including the defense of facies, but in view of the conclusion reached upon the main question in the case we deem it unnecessary to consider them.

For the reasons stated the judgment of the Superior

court should be reversed, and it is so ordered.

JUDGMENT REVERSED.

Sullivan, P. J., and Scanlan, J., concur.

38711

ANTHONY FORTUNA, administrator
of the estate of Agnes Siwula,
deceased,

Appellee,

v.

THE PRUDENTIAL INSURANCE COMPANY
OF AMERICA, a corporation,
Appellant.

417
APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

287 I.A. 620²

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Anthony Fortuna, as administrator of the estate of Agnes Siwula, deceased, sued to recover on a policy of insurance issued on the life of deceased. Trial was had by jury, resulting in a verdict and judgment for plaintiff for \$500, from which this appeal is taken.

The statement of claim alleges that June 15, 1931, defendant issued its policy for \$500 on the life of Agnes Siwula; that she died April 17, 1932; that the policy was in force on the date of her death and had not been paid.

The affidavit of merits averred among other things that the policy should not take effect "if on the date thereof the insured be not in sound health, but that in such event the premiums paid on such policy be returned." It is also averred that the insured was not in sound health on the date of the policy, but was suffering from cancer; that when the policy was issued the insured was confined in the Cook county hospital and had been there from June 10 to July 3, 1931, suffering from an ailment diagnosed as cancer. It is further alleged in an additional affidavit of merits filed by defendant that the policy of insurance sued upon

ANTHONY FORUM, administrator
of the estate of Agnes L. L. L.
deceased.

Appellee,

v.

THE FUNDAMENTAL INSURANCE COMPANY
OF AMERICA, a corporation,
Appellant.

WRIT OF HABEAS CORPUS

COURT OF CHICAGO.

MR. JUSTICE THOMAS delivered the opinion of the court.

Anthony Forum, as administrator of the estate of Agnes L. L. L., deceased, sued to recover on a policy of insurance issued on the life of deceased. Trial was had by jury, resulting in a verdict and judgment for plaintiff for \$500, from which this appeal is taken.

The statement of claim alleges that June 15, 1931, deceased ant issued its policy for \$500 on the life of Agnes L. L.; that she died April 17, 1932; that the policy was in force on the date of her death and had not been paid.

The affidavit of merits averred among other things that the policy should not take effect "if on the date thereof the insured be not in sound health, but that in such event the premium paid on such policy be returned." It is also averred that the insured was not in sound health on the date of the policy, but was suffering from cancer; that when the policy was issued the insured was confined in the Cook county hospital and had been there from June 10 to July 3, 1931, suffering from an ailment diagnosed as cancer. It is further alleged in an additional affidavit of merits filed by defendant that the policy of insurance was upon

was issued on the application of someone purporting to be Agnes Siwula; that the person who signed the application was not in fact Agnes Siwula; that another was substituted for her, and that therefore the policy issued upon said application was void ab initio and of no force and effect.

The policy sued on was received in evidence upon the trial of this cause. It is dated June 15, 1931, and provides specifically that it shall not take effect if on the date thereof the insured is not in sound health. It appears from the evidence that deceased was admitted to the Cook county hospital June 10, 1931, and her illness was diagnosed as carcinoma, or cancer, of the cervix. She died as a result of this disease in April, 1932. Defendant produced evidence tending to show that the application for the policy was made June 12, 1931. The agent who took the application testified that the person whose picture was admitted in evidence and identified by Anton Siwula as a photograph of his wife was not the person who applied for the policy. There is evidence that Agnes Siwula was approximately 5 feet, 9 inches in height, whereas the person who applied for the policy, according to the agent, was not over 5 feet, three inches. An interne at the Cook county hospital, who attended deceased in June and July, 1931, testified that the cancer with which she was afflicted June 12, 1931, had existed for at least eight months prior thereto. Anton Siwula testified that the application for the policy was made on June 9. This presents about the only conflict in the evidence, most of which is documentary and undisputed, and as to this evidence James Aquavia, the agent, and also Anthony D'Arco, who was with Aquavia, testified that Siwula met them after the death of his wife and requested them to change the date of the premium receipt to June 9th, but that they refused to do so.

It therefore appears from the undisputed evidence that deceased was admitted to the Cook county hospital June 10, 1931,

was issued on the application of someone purporting to be Agnes
Simula; that the person who signed the application was not in
fact Agnes Simula; that another was substituted for her, and
that therefore the policy issued upon said application was void
ab initio and of no force and effect.

The policy sued on was received in evidence upon the
trial of this cause. It is dated June 12, 1931, and provides
specifically that it shall not take effect until on the date thereof
the insured is not in sound health. It appears from the evidence
that deceased was admitted to the Cook county hospital June 10,
1931, and her illness was diagnosed as carcinoma, or cancer, of
the cervix. She died as a result of this disease in April, 1932.
Defendant produced evidence tending to show that the application
for the policy was made June 12, 1931. The agent who took the
application testified that the person whose picture was admitted
in evidence and identified by Anton Simula as a photograph of his
wife was not the person who applied for the policy. There is evidence
that Agnes Simula was approximately 5 feet, 9 inches in height, weight
as the person who applied for the policy, according to the agent, was
not over 5 feet, three inches. An intern at the Cook county hospital,
who attended deceased in June and July, 1931, testified that the per-
son with which she was afflicted June 12, 1931, had waited for at
least eight months prior thereto. Anton Simula testified that the
application for the policy was made on June 9. This presents about
the only conflict in the evidence, most of which is documentary and
undisputed, and as to this evidence James Agnew, the agent, and
also Anthony D'Arco, who was with Agnew, testified that Simula was
then, after the death of his wife and requested them to change the date
of the premium receipt to June 9th, but that they refused to do so.
It therefore appears from the admitted evidence that
deceased was admitted to the Cook county hospital June 10, 1931,

and was there continuously until July 3, 1931. The policy was issued June 15th. During this period her illness was diagnosed as cancer of the cervix. Disregarding any dispute that may exist as to the date of the application for the policy, the fact is evident that the applicant was not in sound health on the date of the policy, but was in fact seriously ill with a malignant disease from which she died the following year. It is impossible to believe that either on the day prior to her admission to the hospital or while in the hospital Mrs. Siwula could in good faith have considered herself in sound health. Recent authorities hold that it is not necessary to the avoidance of the policy that the applicant should know that her answers are untrue.

(Western & Southern Life Ins. Co. v. Tomasun, 358 Ill. 496.)

However, we are convinced that the issuance of this policy was procured through fraud. Although there is some slight conflict in the evidence as to the date of the application for the policy, the record is rather convincing that the application was made June 12 - the date that it bears. On that date Mrs. Siwula was in the Cook county hospital, and since the application was taken in her home there is at least a very strong presumption, as indicated by the record, that someone other than she made the application in her absence. Counsel for plaintiff cites no authority in his brief but upon oral argument relied solely upon the recent case of Walsh v. Prudential Ins. Co., 285 Ill. App. 226. After giving that decision respectful consideration, we are satisfied that it is at variance with the Tomasun case, supra, which is the most recent expression of our Supreme court on the subject.

Most of the material facts supporting the conclusion here reached are not disputed but are shown by documentary evidence, hospital records and the testimony of the interne at the hospital. There is, however, some slight conflict in the evidence as to the

and was there continuously until July 3, 1951. The policy was issued June 15th. During this period her illness was diagnosed as cancer of the cervix. It was not until after the date of the policy, but was in fact seriously ill with a malignant disease from which she died the following year. It is impossible to believe that either on the day prior to her admission to the hospital or while in the hospital Mrs. Smith could be said to have considered herself in sound health. Recent authorities hold that it is not necessary to the avoidance of the policy that the applicant should know that her condition was serious. (Western & Southern Life Ins. Co. v. Tompkins, 282 Ill. 436.) However, we are convinced that the intention of this policy was procured through fraud. Although there is some slight conflict in the evidence as to the date of the application for the policy, the record is rather convincing that the application was made June 12 - the date that is borne by the date Mrs. Smith was in the Cook County Hospital, and since the application was made in her home there is at least a very strong presumption, as indicated by the record, that someone other than she made the application in her absence. Counsel for plaintiff cited no authority in his brief but upon oral argument relied solely upon the recent case of Walsh v. Prudential Ins. Co., 282 Ill. App. 2d, 1st div. That decision respecting application, we are confident that it is at variance with the Tompkins case, which is the most recent expression of our Supreme Court on the subject.

Most of the material facts supporting the conclusion here reached are not disputed but are shown by documentary evidence, hospital records and the testimony of the witnesses at the hospital.

There is, however, some slight conflict in the evidence as to the

date of the application for the policy, and in view of this fact the cause will have to be retried. The judgment of the Municipal court is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

Sullivan, P. J., and Seanlan, J., concur.

date of the application for the policy, and in view of this fact the cause will have to be retried. The judgment of the Municipal Court is reversed and the cause remanded for a new trial.

REVEREND AND HONORABLE

GILLIAM, T. J., and GORDON, J., CONCUR.

38725

MARY TESKI,
Appellee,

v.

CONTINENTAL ASSURANCE COMPANY,
a corporation,
Appellant.

42 A
APPEAL FROM SUPERIOR COURT,
COCK COUNTY.

287 I.A. 620³

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Mary Teski instituted suit in the superior court to recover under the terms of a life insurance policy issued by defendant insuring the life of her husband, Henry Teski. Demurrers having been sustained to the several pleas filed by defendant an "amended additional plea IV" was thereupon filed. Plaintiff's demurrer thereto being sustained, defendant elected to stand by its additional plea, whereupon the court entered judgment in favor of plaintiff for \$998. This appeal followed.

Plaintiff's declaration alleges that June 18, 1925, defendant issued to Henry Teski a certain policy of life insurance, copy of which is attached to the declaration, naming Mary A. Teski, wife of insured, as beneficiary; that Henry Teski died November 9, 1932; that all premiums on the policy had been paid in full and in advance up to the time of the death of insured; that due notice of death and proof of claim had been given defendant but that payment by defendant was refused.

It appears from the amended additional plea IV that the annual premium of \$38.85, which became due June 18, 1931, was not paid to defendant, but that July 13, 1931, insured paid the defendant \$20 to apply on the annual premium due June 18, 1931, and at the

MARY TECKI,
Appellee,

v.

CONTINENTAL ASSURANCE COMPANY,
a corporation,
Appellant.

APPEAL FROM SUPERIOR COURT,

JOHN COUNTY.

23
287 I.A. 620

MR. JUSTICE REINHOLD DELIVERED THE OPINION OF THE COURT.

Mary Tecki instituted suit in the superior court to recover under the terms of a life insurance policy issued by defendant insuring the life of her husband, Henry Tecki, on-
mitters having been sustained to the several pleas filed by
defendant an "amended additional plea IV" was thereupon filed.
Plaintiff's demurrer thereto being sustained, defendant elected
to stand by its additional plea, whereupon the court entered
judgment in favor of plaintiff for \$988. This appeal followed.
Plaintiff's declaration alleged that from 1913, 1915,
defendant issued to Henry Tecki a certain policy of life insurance,
copy of which is attached to the declaration, naming Mary A. Tecki,
wife of insured, as beneficiary; that Henry Tecki died November
9, 1932; that all premiums on the policy had been paid in 1911 and
in advance up to the time of the death of insured; that the notice
of death and proof of claim had been given to and by the
payment by defendant was refused.

It appears from the amended additional plea IV that the
annual premium of \$20.00, which became due June 15, 1931, was not
paid to defendant, but that July 15, 1931, insured paid the balance
and \$20 to apply on the annual premium due June 15, 1931, and at the

same time signed a certain note, which is set out in full in the plea. Under the terms of this note the insured agreed to pay the remaining installment of the premium due June 18, 1931, namely, \$18.85, on or before September 18, 1931. The note contains, among others, the following provisions:

"(1) That although said premium has not been paid in full the insurance under said policy shall continue in force until midnight of the day of the next installment due; (2) that the payment of each successive installment on or before its maturity shall further continue said insurance in force until midnight of the day the next installment becomes due; (3) that if all installments be paid in full on or before their respective maturities such payments shall constitute payment of said premium for said time and the Company will issue its usual premium receipt; (4) that if any installment be not paid in full on or before its maturity the insurance under said policy shall thereafter be as though none of said premiums had been paid and as if this note had never been given; the note itself shall thereupon cease to be a claim against the maker and any part of said premium previously paid shall be retained by the Company as its compensation for the extension of credit and other privileges given by the acceptance of this note."

The additional plea further averred that insured did not pay the defendant the installment of \$18.85 referred to in the note, or any portion thereof, on or before September 18, 1931; that there had been lent to insured in September, 1930, under the provisions of the policy \$114, no part of which had been repaid to defendant; that in August, 1932, which was about eleven months after the failure of insured to pay the \$18.85 installment September 18, 1931, as provided in the note, insured signed a certain application for reinstatement of the policy wherein he represented that his answers to the questions in the application were complete and true; that he was in good health; that he had had no disease, injury or illness since originally examined for the policy; and that he had not been attended by any physician, practitioner or surgeon, nor consulted any since the original policy was taken out. The plea further alleges that defendant, relying on the truth of the answers to the questions in the application for reinstatement did reinstate the contract of

same time when a certain note, which is set out in full in the
 plea. Under the terms of this note the insured agreed to pay the
 remaining installment of the premium due June 15, 1931, namely,
 \$18.85, on or before September 15, 1931. The note contained,

among others, the following provisions:

"(1) That although said premium has not been paid in
 full the insurance under said policy shall continue in force until
 midnight of the day of the next installment due; (2) That the
 payment of each successive installment on or before the maturity
 shall further continue said insurance in force until midnight of
 the day the next installment becomes due; (3) That if all install-
 ments be paid in full on or before their respective maturity
 such payments shall constitute payment of said premium for said
 time and the Company will issue its usual premium receipt; (4)
 that if any installment be not paid in full on or before the
 maturity the insurance under said policy shall terminate and the
 through none of said premium has been paid and as in this note
 had never been given; the note itself shall terminate and as to
 be a claim against the maker and any part of said premium pre-
 viously paid shall be returned by the company on its completion
 for the extension of credit and other privileges given by the
 acceptance of this note."

The additional plea further averred that insured did not
 pay the defendant the installment of \$18.85 referred to in the
 note, on any portion thereof, on or before September 15, 1931,
 that there had been no installment paid in September, 1930, under
 the provisions of the policy \$18.85, no part of which had been
 repaid to defendant; that in March, 1932, which was about eleven
 months after the failure of insured to pay the \$18.85 installment
 September 15, 1931, as provided in the note, insured signed a
 certain application for reinstatement of the policy wherein he
 represented that his answer to the questions in the application
 were complete and true; that he was in good health; that he had
 had no disease, injury or illness since originally obtained the
 the policy; and that he had not been attended by any physician,
 practitioner or surgeon, nor consulted any kind of the original
 policy was taken out. The plea further alleges that defendant
 relying on the truth of the answers to the questions in the
 application for reinstatement did refuse to sue contract of

insurance; that insured died November 9, 1932; that at the time he signed the reinstatement application he was suffering from pulmonary tuberculosis and was an inmate of the municipal tuberculosis sanitarium in Chicago, and was not in good health; that the pulmonary tuberculosis and carcinoma of the stomach from which he was suffering caused his death November 9, 1932; that since insured was examined for the original policy of insurance he had been examined by and consulted physicians for pulmonary tuberculosis and other disorders, and that the false answers of insured to the questions in the application for reinstatement were made by insured fraudulently and with intent to deceive defendant and for the purpose of causing defendant to reinstate the policy of insurance; that because of said fraudulent representations in said reinstatement application the policy of insurance was not reinstated.

The additional amended plea IV further avers that any continued or extended insurance under the terms of the policy by virtue of the payment of \$20 to defendant July 13, 1931, expired prior to the date of the death of insured and on, to wit, August 5, 1932.

From the facts admitted by the demurrer to the amended additional plea IV it appears that the contract of insurance between Teski and defendant was dated June 18, 1925. The annual premium specified in the contract was \$38.85. The policy provides that after it had been in force for three full years the insurance company would lend, on the sole security of the policy, any sum which did not exceed the cash surrender value at the end of the then current policy year, as stated in the table of policy values; that a grace period of 31 days would be allowed in the payment of any premium after the first, during which time insurance would

insurance; that insured died November 2, 1932; that at the time he signed the reinstatement application he was suffering from pulmonary tuberculosis and was in receipt of the monthly tuberculosis sanatorium in Chicago, and was not in good health; that the primary tuberculosis was symptoms of the stomach from which he was suffering caused his death November 2, 1932; that insured insured was examined for the original policy of insurance he had been examined by and certified by doctor for pulmonary tuberculosis and other disorders, and that the latest statement insured to the questions in the application for reinstatement were made by insured truthfully and with intent to deceive defendant and for the purpose of causing defendant to reinstate the policy of insurance; that because of said fraudulent representations in said reinstatement application the policy of insurance was not reinstated.

The additional amended plea IV further avers that any non-terminated or extended insurance under the terms of the policy by virtue of the payment of \$25 to defendant July 13, 1933, occurred prior to the date of the death of insured and was, jointly, jointly, 1932.

From the facts admitted by the answer to the amended additional plea IV it appears that the contract of insurance between Tekki and defendant was dated June 1, 1935. The annual premium specified in the contract was \$50.00. The policy provided that after it had been in force for three full years the insurance company would lend, on the sole security of the policy, an amount which did not exceed the cash surrender value at the end of the then current policy year, as stated in the table of policy values; that a grace period of 31 days would be allowed in the payment of any premium after the first, during which time insurance would

continue in force. The contract provides that if the policy should lapse by reason of default in premium payment it could be reinstated upon written application to the company. The policy further provides that all premiums are payable in advance, and that except as provided in the policy the payment of premiums shall not maintain the policy in force beyond the date when the next premium is due. The policy provides for the computation of the reserve upon the American Experience Table of Mortality, and that the cash surrender value of the policy after three years shall be equal to the full reserve, omitting certain fractions, less a surrender charge of not more than 2-1/2% of the amount insured and less any indebtedness to the company; that the amount of paid up insurance and the term of continued insurance will be such as the cash surrender value would purchase as a single premium at the attained age of insured according to the American Experience Table of Mortality. It is provided under the heading of policy values that after the policy has been in force for three full years, upon default in payment of any premium, or in three months after such default, insured may elect one of three options: (1) to receive the surrender value of his policy in cash; (2) to purchase paid up insurance, payable at the same time and on the same conditions as provided in the policy; and (3) to have insurance for the face amount of the policy less any indebtedness to the company thereon continue from date of default without the right of cash loans, for such term as the net cash value will purchase. Under the third provision, and according to the table of policy values, at the end of the sixth year of the policy there was a cash or loan value of \$114, or continued or extended insurance for five years and 256 days. The insured, having obtained from defendant \$114, the full amount of the loan value, there was no extended or continued insurance in effect June 18, 1931, when the policy lapsed for nonpayment of premium. The policy specifi-

continue in force. The contract provides that if the policy should lapse by reason of default in premium payment it shall be reinstated upon written application to the company. The policy further provides that all premiums are payable in advance, and that, except as provided in the policy the payment of premiums shall not constitute the policy in force beyond the date when the next premium is due. The policy provides for the computation of the reserve upon the basis of the Insurance Table of Mortality, and that the cash surrender value of the policy after three years shall be equal to the full premium, including certain fractions, less a surrender charge of not more than 10% of the amount in cash and less any indebtedness to the company; and the amount of paid up insurance and the term of continued insurance will be such as the cash surrender value would purchase as a single premium at the attained age of insured according to the American Experience Table of Mortality. It is provided under the heading of policy values that after the policy has been in force for three full years, upon default in payment of any premium, or in three months after each default, insured may elect one of three options: (1) to receive the surrender value of his policy in cash; (2) to purchase paid up insurance, payable at the same time and on the same conditions as provided in the policy; and (3) to have insurance for the face amount of the policy less any indebtedness to the company thereon and time from date of default without the right of cash loans, for such term as the net cash value will purchase. Under the third provision, and according to the table of policy values, at the end of the second year of the policy there was a cash or loan value of \$150, or 100% of the net cash value for five years and not more. The insured, having obtained from defendant \$150, the full amount of two loan loans, there was no extended or continuing insurance in effect June 1, 1931, when the policy lapsed for nonpayment of premium. The policy specifically

cally provides that the term of continued insurance shall be such as the cash surrender value will purchase as a single premium at the attained age of insured according to the American Experience Table of Mortality.

From the facts admitted by the demurrer to the additional plea IV, it appears further that July 13, 1931, after the policy had lapsed but within the grace period, insured paid \$20 to defendant and signed the note in question, and agreed to pay the remaining installment of \$18.85 on or before September 18, 1931. The contract of insurance, under the provisions of the note, remained in force up to and including September 18, 1931. Defendant contends that the failure of the insured to pay the installment due on that date caused the policy to lapse as of its due date of June 18, 1931. This contention is based upon the provision in the note which specifically provides that if the installment of \$18.85 was not paid September 18, 1931, the insurance under the policy should thereafter be as though the premium had not been paid and as though the note had not been given; and that the note itself should thereupon cease to be a claim against the maker and any part of the premium previously paid should be retained by defendants as its compensation for the extension of credit and other privileges given by the acceptance of the note.

Based upon the facts disclosed by the pleadings, it is first urged by defendant as grounds for reversal and to sustain its position in this controversy, that the note was not a payment of the premium, but was a mere accommodation to the insured to be construed in accordance with its terms; that inasmuch as insured failed to pay the installment of premium in accordance with the plain provisions of the note the policy lapsed June 18, 1931; that since insured had obtained the full amount of the cash or loan value of the policy there was no continued or extended insurance in force at the time of his death. Several decisions in other states and one in

only provided that the term of continued insurance shall be such as the cash surrender value will purchase as a single premium at the attained age of insured according to the American Experience Table of Mortality.

From the facts admitted by the defendant to the additional plea IV, it appears further that July 12, 1931, after the policy had lapsed but within the grace period, insured paid \$20 to defendant and signed the note in question, and agreed to pay the remaining installment of \$18.25 on or before September 12, 1931. The contract of insurance, under the provisions of the note, remained in force up to and including September 12, 1931. Defendant contends that the failure of the insured to pay the installment due on that date caused the policy to lapse as of its due date of June 12, 1931. This contention is based upon the provision in the note which specifically provides that if the installment of \$18.25 was not paid September 12, 1931, the insurance under the policy should terminate. It is argued that the premium had not been paid and as though the note had not been given; and that the note itself would nevertheless serve to be a basis against the maker and any part of the premium previously paid would be retained by defendant as its compensation for the extension of credit and other privileges given by the acceptance of the note.

Based upon the facts disclosed by the pleadings, it is first urged by defendant as grounds for reversal and to sustain its position in this controversy, that the note was not a payment of the premium, but was a mere accommodation to the insured to be continued in accordance with its terms; that insurance as insured failed to pay the installment of premium in accordance with the said provisions of the note the policy lapsed June 12, 1931; that since insured had obtained the full amount of the loan or loan value of the policy there was no contract or extension of insurance in force at the time

Illinois, where the legal effect of similar notes executed by insured persons were considered, are cited by defendant to sustain its position. In White v. New York Life Insurance Co., 200 Mass. 510, a note was given by insured which had provisions similar to the note set forth in the amended plea. The note there contained the following, among other provisions:

"This note is accepted by said Company at the request of the maker, together with \$31.25 in cash on the following express agreement: that although no part of the premium due on the 19th day of August, 1906, * * * has been paid, the insurance thereunder shall be continued in force until midnight of the due date of said note; that if this note is paid on or before the date it becomes due, such payment, together with said cash, will then be accepted by said Company as payment of said premium, and all rights under said policy shall thereupon be the same as if said premium had been paid when due; that if this note is not paid on or before the date it becomes due it shall thereupon automatically cease to be a claim against the maker, and said Company shall retain said cash as part compensation for the rights and privileges hereby granted, and all rights under said policy shall be the same as if said cash had not been paid nor this agreement made."

With reference to the provisions of that note the Massachusetts court held that the agreement signed by the insured was binding on him; that the note was not paid and for that reason, by virtue of the agreement, it ceased to be a claim against the maker; that

"the \$31.25 in cash was treated as a consideration for the privilege which the assured had enjoyed; and the rights of both parties in reference to the policy were precisely the same as if this note had never been given, and the payment in cash had never been made. It is impossible to make the agreement plainer than it is by the written language contained in the note."

In Talsky v. New York Life Insurance Co., 280 N. Y. S. 69

[244 App. Div. 661], suit was brought under a life insurance policy containing provisions for disability indemnity at a premium of \$210.20, payable annually on June 18. The premium due on June 18, 1933, was not paid, but within the thirty day grace period plaintiff requested defendant to extend the period of payment, paid part of the premium, amounting to \$37.50, and executed a note extension agreement which provided that in addition to the \$37.50 paid by the insured he should pay the balance of \$172.70 on or before October 18, 1933. July 4, 1933, insured became totally and permanently

Illinois, where the law effect of similar notes executed by
insured persons were considered, and cited by defendant to sus-
tain its position. In Illia v. New York Life Insurance Co.
200 Mass. 510, a note was given by insured which had provisions
similar to the note set forth in the amended plea. The note
there contained the following, among other provisions:

"This note is accepted by said Company at the request of
the maker, together with \$51.25 in cash on the following expres-
sion: that although no part of the premium due on the 15th
day of August, 1905, * * * has been paid, the insurance there-
under shall be continued in force until midnight of the date of
this note; that if this note is paid on or before the date it
becomes due, such payment, together with said cash, will then be
accepted by said Company as payment of said premium, and all
rights under said policy shall thereupon be the same as if said
premium had been paid when due; that if this note is not paid on
or before the date it becomes due it shall thereupon automatically
cease to be a claim against the maker, and said Company shall re-
tain said cash as part compensation for the rights and privileges
heretofore granted, and all rights under said policy shall be the
same as if said cash had not been paid nor this agreement made."

With reference to the provisions of that note the Massachusetts
court held that the agreement aimed by the insured was binding on
him; that the note was not paid and for that reason, by virtue of
the agreement, it ceased to be a claim against the maker; that
"the \$51.25 in cash was treated as a consideration for the privilege
which the insured had enjoyed; and the rights of both parties in
reference to the policy were precisely the same as if this note had
never been given, and the payment in cash had never been made. It is
impossible to make the agreement plaintiff claims it is by the
language contained in the note."

In Talaky v. New York Life Insurance Co., 280 N. Y. 5. 59
[284 App. Div. 601], suit was brought under a life insurance policy
containing provisions for disability indemnity at a premium of
\$50.20, payable annually on June 18. The premium due on June 18,
1933, was not paid, but within the thirty day grace period plaintiff
requested defendant to extend the period of payment, paid part of
the premium, amounting to \$27.50, and executed a note extension
agreement which provided that in addition to the \$27.50 paid by the
insured he should pay the balance of \$22.70 on or before October
18, 1933. July 4, 1933, insured became totally and permanently

disabled and failed thereafter to pay the balance of \$172.70, according to the provisions of the note. In June, 1934, the insured tendered to defendant the arrears of premium, contending that the note had cured any default existing prior thereto and had continued the policy in force until October 18, 1933, thus entitling him to recover for the disability which had previously occurred. The insurance company contended that the note had not been paid and the policy had lapsed for nonpayment of premium June 18, 1933, according to the provisions of the note which were similar to the provisions of the note in the case before us. In discussing the question under consideration the court pointed out that there was no ambiguity in the provisions of the note; that under plaintiff's agreement, if he did not pay the note when due, his rights would be the same as those of any other policyholder who had defaulted in the payment of premium due June 18, 1933; that the continued life of the policy was conditioned on payment of the note when it matured; that when the note was not paid the conditional privilege was lost and the original default of June 18, 1933, remained. Eddie v. New York Life Insurance Co., 75 Cal. App. 199 [242 Pac. 501] and Underwood v. Jefferson Standard Life Insurance Co., 177 W. C. 327, are to the same effect.

In Keller v. North American Insurance Co., 301 Ill. 198, the Supreme court of this state had occasion to pass upon the question under consideration in a case where the note was given in part payment of a premium due December 30, 1913,

"with the understanding that all claims to further insurance and all benefits whatever which payment in cash of said premium would have secured, shall become immediately void and forfeited to said Company if this note is not paid at maturity."

It was there contended that since the premium was paid partly in cash and partly by notes, an agreement to receive the notes as absolute payment of the premium was established, but the court held otherwise,

discharged and failed thereafter to pay the balance of \$175.00, according to the provisions of the note. In June, 1934, the insured tendered to defend at the return of premium, contending that the note had cured any default existing prior thereto and had continued the policy in force until October 13, 1935, thus entitling him to recover for the disability which he previously occurred. The insurance company contended that the note had not been paid and the policy had lapsed for nonpayment of premium June 1, 1933, according to the provisions of the note which were similar to the provisions of the note in the case before us. In discussing the question under consideration the court pointed out that there was no ambiguity in the provisions of the note; that under plaintiff's agreement, if he did not pay the note when due, his rights would be the same as those of any other policyholder who had defaulted in the payment of premium due June 18, 1933; that the continued life of the policy was conditioned on payment of the note when it matured; that when the note was not paid the conditional privilege was lost and the original default of June 18, 1933, remained. Widdie v. New York Life Insurance Co., 75 Cal. App. 109 [342 Pac. 511] and Underwood v. Jefferson Standard Life Insurance Co., 174 U. S. 327, are to the same effect.

In Keller v. North American Insurance Co., 301 Ill. 198, the supreme court of this state had occasion to pass upon the question under consideration in a case where the note was given in part payment of a premium due December 30, 1913.

"With the understanding that all claims to further insurance and all benefits whatever which payment in cash of said premium would have secured, shall become immediately void and forfeited to said Company if this note is not paid at maturity."

It was there contended that since the premium was paid partly in cash and partly by notes, an agreement to receive the notes as absolute payment of the premium was established, but the court held otherwise,

saying (p. 205):

"This contention is not sound because the notes both state in the same sentence in which it is said that the note is given in part payment of the premium due, that the notes are accepted by the Company 'with the understanding that all claims to further insurance and all benefits whatever which payment in cash of said premium would have secured, shall become immediately void and be forfeited to said Company if this note is not paid at maturity.' * * * By the plain terms of these instruments they were accepted in part payment conditionally on their being paid at maturity, and if not so paid all claims to further insurance, and all benefits whatever which payment in cash would have secured, were forfeited and the policies became void."

We think that the foregoing decisions sustain defendant's contention that the note was not a payment of the premium. The note in the case at bar was similar to the notes involved in the cases cited, and as was said by the Massachusetts court in White v. New York Life Insurance Co., *supra*, "it is impossible to make the agreement plainer than it is by the written language * * *."

Plaintiff seeks to minimize the force of the foregoing decisions by stating that "in none of those cases does the question arise as to whether the note is payment of the premium." This statement is not accurate, because in the case of Keller v. North American Insurance Co., *supra*, the court, in discussing what it characterizes as the "most important question," namely, whether the policies were in force when insured died, states the rule of law to be reasonably well settled that

"a note given by a debtor for a precedent debt will not be held to extinguish the debt in the absence of an agreement to that effect, but will be considered as conditional payment or as collateral security or as an acknowledgment or memorandum of the amount ascertained to be due. The doctrine proceeds on the obvious ground that nothing can be justly considered as payment in fact but that which is in truth such, unless something else is expressly agreed to be received in its place. That a mere promise to pay cannot of itself be regarded as an effective payment is manifest."

The court then quoted from Story on Promissory Notes, cited in Heartt v. Rhodes, 66 Ill. 351, as follows:

"In general, by our law, unless otherwise specially agreed, the taking of a promissory note for a pre-existing debt or a contemporaneous consideration is treated prima facie as a conditional payment, only, - that is, as payment, only, if it is duly paid at maturity."

having (p. 325):

"This contention is not sound because the note is stated in the same sentence in which it is said that the note is given in part payment of the premium due, that the note is accepted by the company 'with the understanding that all claims to further insurance and all benefits payable thereon shall be void and be forfeited to said company if this note is not paid at maturity.' By the plain terms of these instruments they were accepted in part payment conditionally on their being paid at maturity, and it now so held all claims to further insurance, and all benefits payable thereon which would have been paid were forfeited and the policies became void."

We think that the foregoing decisions sustain defendant's contention that the note was not a payment of the premium. The note in the case at bar was similar to the notes involved in the case cited, and as was said by the Massachusetts court in Wright v. New York Life Insurance Co., supra, "it is impossible to make the contract plain-er than it is by the written language * * *."

Plaintiff seeks to minimize the force of the foregoing decisions by stating that "in none of those cases was the question raised as to whether the note is payment of the premium." This statement is not accurate, because in the case of Waller v. North American Insurance Co., supra, the court, in discussing that it characterizes as the "most important question," namely, whether the policies were in force when insured died, stated the rule of

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"a note given by a debtor for a pre-set debt will not be held to extinguish the debt in the absence of an agreement to that effect, but will be considered as conditional payment or as collateral security or as an acknowledgment or memorandum of the amount ascertained to be due. The doctrine proceeds on the obvious ground that nothing can be justly considered as payment in fact but that which is in truth such, unless something else is expressly agreed to be received in its place. That a mere promise to pay cannot at all be regarded as an effective payment in itself."

The court then quoted from Wright v. New York Life Insurance Co., supra, as follows:

"In general, by our law, unless otherwise specified in writing, the taking of a promissory note for a pre-set debt or a sum-temperament consideration is treated prima facie as a conditional payment, only, - that is, as payment, only, if it is duly paid at maturity."

The court concluded its discussion of the point as follows:

"In the absence of an express agreement by the company to accept the notes in question as an absolute payment of the premium the premiums cannot be considered paid."

In harmony with these decisions the policy in question should be deemed to have lapsed at the time the annual premium became due, and since insured had prior thereto obtained the full amount of the cash or loan value of the policy there was no continued or extended insurance in force at the time of his death. According to the provisions of the note defendant is authorized to retain the sum of \$20 as compensation for the extension of credit and other privileges given by the acceptance of the note. A similar provision was approved in White v. New York Life Insurance Co. and Talsky v. New York Life Insurance Co., supra.

Plaintiff argues, however, that we ought to consider the payment of \$20 on July 13, 1931, and retained by defendant, as part payment of the premium, as the result of which insured would be entitled to any extended or continued insurance for the period covered by the \$20 thus paid. There is no merit to this contention, because the length of the continued or extended insurance in any event is an actuarial question, and since it is specifically averred in the amended additional plea IV, and admitted by the demurrer thereto, that any continued or extended insurance under the terms of the policy by virtue of the payment of \$20 to the defendant on July 13, 1913, expired prior to the date of insured's death, and, on to wit, August 5, 1932, it is difficult to understand how plaintiff can now avail herself of the argument made.

As to the reinstatement of the policy, the allegations of the amended additional plea, if taken to be true, clearly indicate that misrepresentations of fact were made by insured which constituted fraud. It is averred that when the application for re-

The court concluded its discussion of the point as follows:

"In the absence of an express agreement by the company to accept the notes in question as an absolute payment of the premium the premium cannot be considered paid."

In harmony with these holdings the policy in question should be deemed to have lapsed at the time the annual premium became due, and since insured had prior thereto obtained the full amount of the cash or loan value of the policy there was no continued or extended insurance in force at the time of his death. According to the provisions of the note defendant is authorized to retain the sum of \$20 as compensation for the extension of credit and other privileges given by the acceptance of the note. A similar provision was approved in White v. New York Life Insurance Co. and Talbot v. New York Life Insurance Co., supra.

Plaintiff argues, however, that we ought to consider the payment of \$20 on July 13, 1913, and retained by defendant, as part payment of the premium, as the result of which insured would be entitled to any extended or continued insurance for the period covered by the \$20 thus paid. There is no merit to this contention, because the length of the continued or extended insurance in any event is an actual question, and since it is specifically averred in the amended additional plea IV, and admitted by the defendant thereto, that any continued or extended insurance under the terms of the policy by virtue of the payment of \$20 to the defendant on July 13, 1913, expired prior to the date of insured's death, and, on twelfth August 2, 1932, it is difficult to understand how plaintiff can now avail herself of the argument made.

As to the reinstatement of the policy, the allegations of the amended additional plea, if taken to be true, clearly indicate that misrepresentations of fact were made by insured which com-

instatement was made insured was a patient in the Chicago Municipal Tuberculosis Sanitarium, that he was afflicted with pulmonary tuberculosis and cancer, and these allegations are admitted by the demurrer to be true. Under the circumstances we think the defense interposed, that the policy was not reinstated and was not in force at the time of insured's death, is well taken. The policy was reinstated upon the representations made by insured that he was in sound health, that he had not been treated by a doctor, etc. These representations, if true, would have entitled him to reinstatement. However, since they were manifestly untrue, and admitted to be fraudulent by plaintiff's demurrer to the amended additional plea, it would seem to follow that defendant had a right to set aside the reinstatement and refuse to honor the claim.

Other points raised by plaintiff present no convincing reasons for sustaining the judgment. We are of the opinion that the court erred in sustaining the demurrer to the amended additional plea IV. Judgment of the superior court is reversed and the cause remanded with directions that the demurrer be overruled and ~~further proceedings had in keeping with the views herein expressed.~~

REVERSED AND REMANDED WITH DIRECTIONS.

Sullivan, P. J., and Scanlan, J., concur.

per letter
11-27-36

institutions was made in 1910 was a patient in the Chicago Municipal
Tuberculosis Sanatorium, and he was afflicted with pulmonary tuber-
culosis and cancer, and these conditions were admitted by the doctor
to be true. Under the circumstances we think the defense proposed
that the policy was not reinstated and was not in force at the time
of insured's death, is well taken. The policy was reinstated upon
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tions, if true, would have entitled him to reinstatement. However,
since they were manifestly untrue, and entitled to be fraudulent by
insured's behavior to the amended additional clause, it would seem
to follow that defendant had a right to set aside the reinstatement
and refuse to honor the claim.

Other points raised by plaintiff present no convincing

reasons for sustaining the judgment. As one of the opinions that the
court expressed in sustaining the demurrer to the amended additional
clause IV. Judgment of the superior court is reversed and the cause
remanded with directions that the demurrer be overruled and further
proceedings had in respect to the plaintiff's motion for judgment.
A VERDICT AND REMANDING THE CAUSE.

Sullivan, P. J., and Connelley, J., concur.

38734

PALACE LIVE POULTRY CAR COMPANY,
a corporation,

Appellee,

v.

ALEX GETZ,

Appellant.

APPEAL FROM CIRCUIT
COURT, COOK COUNTY.

287 I.A. 620⁴

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

By this appeal defendant seeks to reverse a decree of the circuit court holding him to account to plaintiff for the use by defendant as well as by others, including Getz Poultry & Egg Corporation, of a certain railway car designed for the transportation of live poultry.

The original complaint named Getz and Getz Poultry & Egg Corporation as defendants. Demurrers filed by both defendants were sustained, and plaintiff filed an amended bill. Getz filed his answer thereto, and Getz Poultry & Egg Corporation demurred. By stipulation of the parties plaintiff was then given leave to file a second amended bill, which Getz again answered. The demurrer thereto by Getz Poultry & Egg Corporation was sustained, and the corporation was thus eliminated as a defendant and no relief is sought against it.

The issues thus made by the second amended complaint and Getz's answer were referred to a master in chancery, who heard the cause and filed a report recommending that Getz be held to account to plaintiff for his use of the car in the transportation of live poultry. Exceptions to the master's report were sustained by the chancellor, and the decree appealed from was entered directing

38734

PALACE LIVE POULTRY CAR COMPANY,
a corporation,

Appellee,

v.

ALIX GETZ,

Appellant.

APPEAL FROM CIRCUIT

COUNTY, OREGON.

287 I.A. 620

MR. JUSTICE BRIDGES DELIVERED THE OPINION OF THE COURT.

By this appeal defendant seeks to reverse a decree of

the circuit court holding him to account to plaintiff for the
use by defendant as well as by others, including Getz Poultry &
Egg Corporation, of a certain railway car designed for the
transportation of live poultry.

The original complaint named Getz and Getz Poultry &

Egg Corporation as defendants. Defendants filed by both defendants
were sustained, and plaintiff filed an amended bill. Getz filed
his answer thereto, and Getz Poultry & Egg Corporation answered.
By stipulation of the parties plaintiff was then given leave to
file a second amended bill, which Getz again answered. The
demurrer thereto by Getz Poultry & Egg Corporation was sustained,
and the corporation was thus eliminated as a defendant and no
relief is sought against it.

The issues thus made by the second amended complaint and
Getz's answer were referred to a master in chancery, who heard the
cause and filed a report recommending that Getz be held to account
to plaintiff for his use of the car in the transportation of live
poultry. Exceptions to the master's report were sustained by

Getz to account to plaintiff for the use of the car in question, "so far as Getz may have used it or permitted its use by others, including Getz Poultry & Egg Corporation."

The facts, so far as they are material to the issues involved, disclose that Getz had from time to time procured cars from Live Poultry Transit Co., predecessor in interest to plaintiff (hereinafter termed plaintiff's predecessor), not only for transportation but also for the storage of live poultry. Such a car was procured by him October 19, 1924, pursuant to a bill of sale which recited a consideration of \$125 and described the car as "one (1) wooden superstructure railway car, designed for the transportation of live poultry, and for convenience bearing the number 3434; subject to license agreement covering royalties on patents, this day entered into between the parties hereto." At the same time Getz executed and delivered the so-called license agreement, dated October 16, 1924, reciting in substance that Live Poultry Transit Co., a Delaware corporation, referred to as the "licenser," had the exclusive license for the use of all patents and applications for patents relating to railway cars for the transportation of live-poultry, and granting unto Getz, as licensee, the right to the use of said patents in connection with the car purchased by him, and for no other purpose, so long as the car should be used by Getz for the storage of live poultry, without royalty, but that in case Getz should thereafter use the car for the transportation of live poultry, then the licenser agreed that the amount of royalties to be charged to and paid by Getz should be exactly the same sum of money per trip as is covered by the railway tariffs in effect pertaining to the rental of live poultry cars, as approved by the Interstate Commerce Commission, together with the additional sum therefor, as a part of the royalty, equal to the mileage allowed

Getz to account to plaintiff for the use of the car in question, "so far as Getz may have used it or permitted its use by others, including Getz Poultry & Egg Corporation."

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involved, disclose that Getz had from time to time procured cars from Live Poultry Transit Co., predecessor in interest to plaintiff (hereinafter termed plaintiff's predecessor), not only for transportation but also for the storage of live poultry. Such a car was procured by him October 19, 1934, pursuant to a bill of sale which recited a consideration of \$135 and described the car as "one (1) wooden superstructure poultry car, designed for the transportation of live poultry, and for convenience bearing the number 8484; subject to license agreement covering royalties on patents, this day entered into between the parties hereto." At the same time Getz executed and delivered the so-called license agreement, dated October 16, 1934, reciting in substance that Live Poultry Transit Co., a Delaware corporation, referred to as the "licensee," had the exclusive license for the use of all patents and applications for patents relating to railway cars for the transportation of live poultry, and granting unto Getz, as licensee, the right to the use of said patents in connection with the car purchased by him, and for no other purpose, so long as the car should be used by Getz for the storage of live poultry, without royalty, but that in case Getz should hereafter use the car for the transportation of live poultry, then the licensee agreed that the amount of royalties to be charged to and paid by Getz should be exactly the same as of money per trip as is covered by the royalty tariff in effect pertaining to the rental of live poultry cars, as approved by the Interstate Commerce Commission, together with the additional amount therefor, as a part of the royalty, equal to the mileage allowed

and paid by railroads for the use of live poultry cars covered by railroad tariffs approved by the Interstate Commerce Commission.

After using the car several years for storage purposes only, and never for transportation, it became pretty badly worn and Getz sought from plaintiff's predecessor an estimate on repairs. Instead of repairing the old car, however, plaintiff's predecessor delivered to Getz another car, No. 3435, "in place of" car No. 3434, as Getz testified. The exchange was made without the passing of any bill of sale or other writing.

In 1928 Getz received an inquiry from the Pennsylvania railroad yardmaster as to the ownership of the second car, No. 3435. Getz was advised that if he did not establish title to this car in himself he would be charged demurrage, trackage, etc. By way of reply Getz exhibited the bill of sale and contract relating to car No. 3434, but when the railroad employee observed the discrepancy in the numbers, Getz took the original bill of sale and contract back to plaintiff's predecessor and contacted one Waldo Johnson, vice president of the concern, and told him that "the railroad is after me; you better give me something, a bill or something, on 3435, showing that it belongs to us." Johnson took the two documents to another room and upon his return handed them back to Getz with the number 3434 changed to 3435 on both the bill of sale and the license agreement. Getz accepted the documents as altered.

It is conceded, of course, that under the license agreement which accompanied the bill of sale to car No. 3434 Getz was limited to the use of the car for storing live poultry only, without royalty, and that in no event would he have been permitted to use the car for transportation of live poultry without paying royalties and mileage therefor, in accordance with the schedule approved by the Interstate Commerce Commission. Getz takes the position, however, that since no

and paid by railroad for the use of live poultry cars covered by railroad tariffs approved by the Interstate Commerce Commission. After using the car several years for storage purposes only, and never for transportation, it became greatly badly worn and was bought from plaintiff's predecessor and sold to defendant. Instead of repairing the old car, however, defendant's predecessor delivered to defendant another car, No. 3435, "in place of" car No. 3434, as was testified. The exchange was made without the hearing of any bill of sale or other writing.

In 1908, defendant received an inquiry from the Pennsylvania Railroad Corporation as to the ownership of the second car, No. 3435. Defendant was advised that if he did not establish title to this car in himself he would be charged damages, freight, etc. By way of reply, defendant exhibited the bill of sale and contract relating to car No. 3434, but when the railroad employee observed the discrepancy in the numbers, defendant took the original bill of sale and contract back to plaintiff's predecessor and contacted one John Johnson, vice president of the concern, and told him that "the railroad is after me; you better give me something, a bill or something, on 3435, showing that it belongs to me." Johnson took the two documents to another room and upon his return handed them back to defendant with the number 3434 changed to 3435 on both the bill of sale and the license agreement. Defendant accepted the documents as altered.

It is conceded, of course, that under the license agreement which accompanied the bill of sale to car No. 3434, defendant was limited to the use of the car for storing live poultry only, without repaying, and that in no event would he have been permitted to use the car for transportation of live poultry without paying royalties and otherwise, in accordance with the schedule approved by the Interstate Commerce Commission. Defendant takes the position, however, that since no

new bill of sale or license agreement passed between the parties at the time Getz obtained car No. 3435 by trade, the license agreement theretofore existing was thereby rendered void by merger of title; that the limitation which had been placed upon the use of the car under the original license agreement was removed when the exchange was made; and that thereafter Getz was at liberty to use car No. 3435 not only for the storage of live poultry but also for the transportation thereof, without subjecting himself to the charges for royalties and mileage imposed by the original agreement pertaining to No. 3434. We cannot concur in this contention for several reasons. Getz himself testified that he received car No. 3435 "in place of" car No. 3434, and it was evidently his understanding that because of the circumstances under which the exchange was made and the bill of sale later altered the relationship between the parties had not changed. Moreover, when the railroad authorities demanded of Getz proof of his ownership of car No. 3435, he exhibited the original bill of sale and license agreement, thereby indicating, we believe, that he recognized owning car No. 3435 under the conditions specified in the original bill of sale and license agreement. Furthermore, if Getz himself had not considered the written instruments altering the conditions under which he purchased car No. 3434 as applicable to the possession of car No. 3435, it is difficult to understand why he accepted from plaintiff's predecessor the original bill of sale and license agreement with a mere alteration of the car numbers. It also appears from the evidence that in 1932 Getz represented to the officials of the railroad company that he owned car No. 3435, and to prove his ownership he exhibited to them the same original bill of sale and license agreement with the altered numbers thereon. In view of these circumstances he cannot now claim that the limitations were removed when he acquired the second car. Such claim is inconsistent with his subsequent conduct by which he held himself out as the owner

new bill of sale or license agreement passed between the parties at the time Geta obtained car No. 3433 by trade, the license agreement therefore existing was thereby rendered void by reason of title; that the limitation which had been placed upon the use of the car under the original license agreement was removed when the exchange was made; and that thereafter Geta was at liberty to use car No. 3433 not only for the storage of live poultry but also for the transportation thereof, without subjecting himself to the charges for royalties and mileage imposed by the original agreement pertaining to No. 3434. He cannot contend in this contention for several reasons. Geta himself testified that he received car No. 3433 "in place of" car No. 3434, and it was evidently his understanding that because of the circumstances under which the exchange was made and the bill of sale later altered the relationship between the parties had not changed. Moreover, when the railroad authorities demanded of Geta proof of his ownership of car No. 3433, he exhibited the original bill of sale and license agreement, thereby indicating, we believe, that he recognized owning car No. 3433 under the conditions specified in the original bill of sale and license agreement. Furthermore, if Geta himself had not considered the written instrument altering the conditions under which he purchased car No. 3434 as applicable to the possession of car No. 3433, it is difficult to understand why he accepted from plaintiff's predecessor the original bill of sale and license agreement with a mere alteration of the car numbers. It also appears from the evidence that in 1935 Geta returned to the officials of the railroad company that he owned car No. 3433, and to prove his ownership he exhibited to them the same original bill of sale and license agreement with the altered numbers thereon. In view of these circumstances he cannot now claim that the limitation was removed when he acquired the second car. Such claim is inconsistent with his subsequent conduct by which he held himself out as the owner

of car No. 3435 subject to the license limitations applicable to car No. 3434.

It is next urged that Johnson, as vice president of plaintiff's predecessor corporation, had no authority by virtue of his office to make a contract for his company or to alter the terms of the contract theretofore made. We think it is a sufficient answer to this contention to quote from the record, indicating that substantially all of Getz's dealings had been had with Johnson and by which Johnson's authority to act for plaintiff's predecessor is pretty clearly established. The following excerpts are taken from the cross-examination of Getz:

"Q. When you went to take these papers up to Mr. Johnson, how come you didn't take them to Mr. Mudd who signed them, you knew him, didn't you?

A. I wasn't doing business with Mr. Mudd.

Q. Mr. Mudd had signed these papers?

A. I know it, but my transactions were with Mr. Johnson most of the time.

Q. Hadn't you ever transacted business with Mr. Mudd?

A. Not to my knowledge. I even borrowed twenty thousand dollars through Mr. Johnson.

Q. You had never transacted business with Mr. Mudd?

A. I never asked Mr. Mudd for anything.

Q. Did you know him?

A. Yes, casually, not intimately.

Q. So when you wanted the numbers changed in these papers instead of taking them to him you took them to Johnson?

A. Yes."

It is further urged that the exchange of cars and the alteration of the original bill of sale and contract as to the car numbers constituted a modification of the original agreement and required a new consideration to support it. Getz admitted receiving the second car to replace the one which was no longer useful to him. This of itself was a sufficient consideration. In addition thereto the record is replete with evidence indicating that Getz exhibited the altered documents to various persons as proof of his individual ownership of car No. 3435, and the acceptance of the altered documents made the instruments as modified binding on him.

Defendant's counsel apparently concedes that the finding

of car No. 3435 subject to the license limitation applicable to car No. 3434.

It is next urged that Johnson, as vice president of plaintiff's predecessor corporation, had no authority by virtue of his office to make a contract for his company or to alter the terms of the contract theretofore made. We think it is a sufficient answer to this contention to quote from the record, indicating that substantially all of Getz's dealings had been had with Johnson and by which Johnson's authority to act for plaintiff's predecessor is pretty clearly established. The following excerpts are taken from the cross-examination of Getz:

"Q. When you went to take these papers up to Mr. Johnson, how come you didn't take them to Mr. Lind? Who signed them, you knew him, didn't you?

A. I wasn't doing business with Mr. Lind.

Q. Mr. Lind had signed these papers?

A. I know it, but my transactions were with Mr. Johnson most of the time.

Q. Hadn't you ever transacted business with Mr. Lind?

A. Not to my knowledge. I can't remember twenty thousand dollars through Mr. Johnson.

Q. You had never transacted business with Mr. Lind?

A. I never asked Mr. Lind for anything.

Q. Did you know him?

A. Yes, casually, not intimately.

Q. So when you wanted the numbers changed in these papers instead of taking them to him you took them to Johnson?

A. Yes."

It is further urged that the exchange of cars and the alteration of the original bill of sale and contract as to the car numbers constituted a modification of the original agreement and required a new consideration to support it. Getz admitted receiving the second car to replace the one which was no longer useful to him. This of itself was a sufficient consideration. In addition thereto the record is replete with evidence indicating that Getz exhibited the altered documents to various persons as proof of his financial soundness of car No. 3435, and the acceptance of the altered documents made the instruments as modified binding on him.

Getz admitted generally and fully conceding that the finding

of the master that Getz should be held to account for any rental or mileage received by him for transporting poultry in car No. 3435 is proper, because he characterizes that finding as "probably the correct view," but it is argued that Getz's liability to account should not extend through the period of proprietorship of this car by Getz Poultry & Egg Corporation. The record contains a history of the various names under which Getz operated his business since 1924. He encountered many vicissitudes following the delivery to him of car No. 3435. In 1929 the business was taken over by a corporation known as Alex Getz & Co. In 1930 it was succeeded by Getz Poultry & Egg Corporation. The relationship of these concerns is not clear, but they were evidently formed to carry on the business which Getz had initiated. Getz testified that his only interest in the corporation was that of manager in general charge of the operations of the company, with all of the authority and responsibilities of that position. According to his testimony Getz Poultry & Egg Corporation was organized in 1930 at the instance of his brother, Meyer Getz, and one Mr. Meyer, both of whom were Getz's employees. Getz's wife also had a substantial interest in the new company and was active in its affairs. The personnel of the organization remained practically unchanged under the successive proprietorships. Several employees of the business testified that they recognized the defendant, Getz, as their employer throughout the period of these changes. W. L. Kendall, general dairy agent of the Erie railroad, testified that Getz telephoned him in 1932 "stating that that car belonged to him, and any rental or mileage accruing on that car should be paid to Mr. Getz, as he was the owner of the car," and that "he told me to substantiate the fact that he was the owner of the car he would forward me a copy of the bill of sale;" that thereafter Kendall received from Getz a copy of the

of the matter that Getz should be held to account for any rental or mileage received by him or transportation company in connection with the property, because he characterized that rental as "probably the correct view," but it is agreed that Getz is liable to account should not extend through the period of proprietorship of this car by Getz Realty & Ice Corporation. The record contains a history of the various names under which Getz operated his business since 1924. He encountered many vicissitudes following the delivery to him of car No. 3433. In 1922 the business was taken over by a corporation known as Getz & Co. In 1923 it was succeeded by Getz Realty & Ice Corporation. The relationship of these concerns is not clear, but they were evidently formed to carry on the business which Getz had initiated. Getz testified that his only interest in the corporation was that of owner in general terms of the operations of the company, with all of the authority and responsibility of that position. According to his testimony Getz Realty & Ice Corporation was organized in 1920 at the instance of his brother, Meyer Getz, and one Mr. Meyer, both of whom were Getz's employees. Getz's wife also had a substantial interest in the new company and was active in its affairs. The personnel of the organization remained practically unchanged until the successive proprietorships. Several employees of the business testified that they recognized the defendant, Getz, as their employer throughout the period of these changes. A. L. Randall, General Sales Agent of the wife testified, testified that Getz telephoned him in 1932 "stating that that car belonged to him, and any rental or mileage accruing on that car should be paid to Mr. Getz, as he was the owner of the car," and that "he told me to substantiate the fact that he was the owner of the car he would forward me a copy of the bill of sale," that the latter Randall received from Getz a copy of the

bill of sale, designating car No. 3435. David P. Skinner, western dairy agent for New York Central Lines, testified that April 30, 1932, Getz telephoned him that he was shipping car No. 3435 with live poultry to New York; that he replied to Getz, "Since when have you been in the car business?" and that Getz replied "Oh! I have owned these cars for a long time." The testimony of these witnesses is undisputed, and from this evidence the nature and extent of the corporation's proprietorship of the car would seem extremely doubtful.

Getz testified that in the fall of 1930, following the organization of Getz Poultry & Egg Corporation, he sold car No. 3435 to the company, executing a bill of sale therefor and together therewith delivered to Getz Poultry & Egg Corporation the original bill of sale and license agreement showing the altered car number. When asked what he received in payment for this transaction Getz first stated that he did not remember, later recalled that "it was nothing less than a dollar," and ultimately stated that he got a "job and some money" for the car, the job being that of manager. In the light of this testimony and the circumstances of the case we cannot sustain defendant's contention that Getz Poultry & Egg Corporation was the bona fide owner of the car in question. We are of the opinion that the chancellor properly held that Getz individually should be liable for any revenues accruing under the terms of the original license agreement because of the use of car No. 3435 for transportation purposes by Getz individually, as well as by other persons or corporations using the car with Getz's consent or permission, including Getz Poultry & Egg Corporation. Marsh v. Dodge, 66 N. Y. 533, cited by plaintiff, sustains this conclusion.

Lastly it is urged that plaintiff is guilty of laches. This issue was not raised by the pleadings and consequently plaintiff was not required to introduce evidence explaining the delay in instituting

bill of sale, designating car No. 3435. David P. Skinner, Western
 dairy agent for New York Central Lines, testified that April 30,
 1932, Geta telephoned him that he was shipping car No. 3435 with
 live poultry to New York; that he replied to Geta, "When
 have you been in the car business?" and that Geta replied "Oh I
 have owned these cars for a long time." The testimony of these
 witnesses is undisputed, and from this evidence the nature and
 extent of the corporation's proprietary interest in the car would seem
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Geta testified that in the fall of 1930, following the
 organization of Geta Poultry & Egg Corporation, he sold car No. 3435
 to the company, executing a bill of sale therefor and together
 therewith delivered to Geta Poultry & Egg Corporation the original
 bill of sale and license agreement showing the altered car number.
 When asked what he received in payment for this transaction Geta
 first stated that he did not remember, later recalling that "it was
 nothing less than a dollar," and ultimately stated that he got a
 "job and some money" for the car, the job being that of manager.
 In the light of this testimony and the circumstances of the case we
 cannot sustain defendant's contention that Geta Poultry & Egg Cor-
 poration was the bona fide owner of the car in question. We are
 of the opinion that the chancellor properly held that Geta individ-
 ually should be liable for any revenues accruing under the terms of
 the original license agreement because of the use of car No. 3435
 for transportation purposes by Geta individually, as well as by other
 persons or corporations using the car with Geta's consent or per-
 mission, including Geta Poultry & Egg Corporation. Smith v. Rogers,
 66 N. Y. 533, cited by plaintiff, sustains this conclusion.

Lastly it is urged that plaintiff is guilty of laches. This
 issue was not raised by the plaintiff and consequently plaintiff was
 not required to introduce evidence explaining the delay in instituting

suit. The law is well settled that laches may not be invoked unless pleaded. (Ogden v. Stevens, 241 Ill. 556.) Defendant in his reply brief concedes this to be the rule.

We find no convincing reasons for reversal of the decree and it is affirmed.

AFFIRMED.

Sullivan, P. J., and Scanlan, J., concur.

exists. The law is well settled that judges may not be impeached
unless proved. (United v. Sawyer, 111 Ill. 256.) Defendant in
his reply brief concedes this to be the rule.

We find no convincing reasons for reversal of the decree
and it is affirmed.

WYLAND.

Sullivan, P. J., and Connelley, J., concur.

38796

XENOPHON PAVLOS,
Appellant,

v.

BERT CARLSON and
MILTON ADELMAN,
Appellees.

447
APPEAL FROM SUPERIOR COURT,
COOK COUNTY.

287 I.A. 621¹

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Bert Carlson, one of the defendants herein, brought suit in the municipal court against plaintiff to recover damages resulting from an automobile collision. The suit was determined adversely to Carlson and he thereupon brought a second suit based upon the same facts, which again resulted in findings and judgment in favor of Pavlos and against Carlson. Thereupon plaintiff filed a bill in the superior court seeking to restrain Carlson and his attorney, Milton Adelman, from instituting further proceedings, and asking damages resulting from the second municipal court suit including reasonable attorney's fees and costs. The superior court entered a restraining order but refused to award damages to plaintiff. By this appeal plaintiff seeks to reverse that part of the order or decree which denied him the damages sought.

Defendants have not appeared or filed briefs on appeal, and plaintiff's one contention in urging that a portion of the decree be reversed so as to include damages incurred by him in defending the municipal court suits is that he was put to expense and loss of time in interposing a defense to two frivolous and vexatious suits, for which he should be compensated. It is argued that since the chancellor took jurisdiction of the cause and granted

38708

WILSON, JAMES
Appellant,

v.

WILSON, JAMES and
WILSON, JAMES
Appellees.

WILSON, JAMES and
WILSON, JAMES

WILSON, JAMES

287 I.A. 621

MR. JUSTICE WILSON DELIVERED THE OPINION OF THE COURT.

Bert Carlson, one of the defendants herein, brought suit in the municipal court against plaintiff to recover damages resulting from an automobile collision. The suit was determined adversely to Carlson and he thereupon brought a second suit based upon the same facts, which again resulted in finding and judgment in favor of Taylor and against Carlson. Thereupon plaintiff filed a bill in the superior court seeking to restrain Carlson and his attorney, Wilson, from instituting further proceedings, and seeking damages resulting from the second municipal court suit including reasonable attorney's fees and costs. The superior court entered a restraining order but refused to award damages to plaintiff. By this appeal plaintiff seeks to reverse that part of the order or decree which denied him the damages sought. Defendants have not appeared on this appeal as appellants and plaintiff's one contention in regard to a portion of the decree is reversed so as to include damages awarded by him in determining the municipal court suit in that he was not in possession of time in instituting a second suit in the municipal court. It is ordered that since the above facts justify plaintiff of the same and stated various other facts, which he should be compensated. It is ordered that since the above facts justify plaintiff of the same and stated

an injunction that he should have also granted plaintiff complete relief by awarding him the expense and loss of time incurred in connection with the second municipal court suit, including attorney's fees. Roach & Co. v. Harding, 348 Ill. 454, is the only case cited to support this contention. That case merely holds that equity, having jurisdiction of a matter, will grant full relief even though legal remedies must be administered in so doing.

The defense of the second suit was undoubtedly vexatious and put plaintiff to considerable expense, but we know of no statute or rule of law, and none has been cited, which would have justified the court in awarding the damages sought. Some states by statute allow damages under similar circumstances, but that is a matter for the legislative assembly. The decree of the superior court is affirmed.

AFFIRMED.

Sullivan, P. J., and Scanlan, J., concur.

an injunction that he should have also granted an order of
relief by awarding him the expenses and loss of time incurred in

connection with the second marriage suit, including
attorney's fees. People v. Harbison, 111 Ill. 481, is the
only case cited to support this contention. That case merely
holds that equity, having jurisdiction of a matter, will grant
final relief even though legal remedies may be available in
as doing.

The defense of the second suit was undoubtedly weakened
and put in peril to considerable expense, but we know of no
statute or rule of law, and none has been cited, which would have
justified the court in awarding the damages sought. And the
by statute allow damages under similar circumstances, but that
is a matter for the legislative assembly. The defense of the
superior court is affirmed.

WILLIAM.

Sullivan, P. J., and Connors, J., concur.

38834

457

LITHUANIAN ALLIANCE OF AMERICA,
a corporation,
(plaintiff below),
Appellee,

v.

HOME BANK & TRUST COMPANY, as
trustee, under trust agreement
No. 698, et al.,
Defendants.

APPEAL FROM CIRCUIT
COURT, COOK COUNTY.

THEODORE A. POSKA, conservator of
the estate of Felicia Poszka,
Insane,
(Defendant and cross-complainant
below),
Appellant.

287 I.A. 621²

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

August 1, 1933, Lithuanian Alliance of America, a corporation, filed a bill to foreclose a trust deed dated August 25, 1927, made by Home Bank & Trust Company, as trustee, securing an indebtedness of \$12,000. The complaint joined as defendants certain "unknown owners," who are described as persons claiming to be interested in the subject matter of the foreclosure "or in the real estate or some part or parts thereof as the owner or owners, holder or holders of the real estate." Thereafter, February 9, 1934, pursuant to an order of court, Theodore A. Poska, conservator of the estate of Felicia Poszka, insane, obtained leave to become a party defendant to the bill, answered the complaint and filed a cross bill, to which the Lithuanian Alliance of America filed its general and special demurrer.

Subsequently the cross bill was amended, as was the general

42824

INDEMNITY ALLIANCE OF AMERICA,
a corporation,
(plaintiff, below),
Appellee,

v.

HOMER BANK & TRUST COMPANY, as
trustee, under first mortgage
No. 698, of all
Landholders.

THEODORE A. FORK, conservator of
the estate of William L. Fork,
Plaintiff,
(Respondent and cross-complainant
below),
Appellant.

ALL JUSTICE DENIED IN ALLIANCE THE ALLIANCE OF AMERICA.

August 1, 1933, Indemnity Alliance of America, a

corporation, filed a bill to foreclose a first deed dated August
28, 1927, made by Homer Bank & Trust Company, as trustee, securing

an indebtedness of \$12,000. The complaint joined as defendants

certain "unknown owners," who are described as persons claiming

to be interested in the subject matter of the foreclosure and in

the real estate or some part or parts thereof as the owner or

owners, holder or holder of the real estate." (Complaint,

Exhibit 2, 1934. Pursuant to an order of Justice Theodore A. Fork,

conservator of the estate of William L. Fork, plaintiff, desired leave

to become a party defendant to the bill, answered the complaint and

filed a cross bill, to which the Indemnity Alliance of America filed

its general and special answer.

Subsequently the cross bill was amended, as was the general

ANSWER, CROSS COMPLAINT
AND AMENDED CROSS COMPLAINT

227 I.A. 621

and special demurrer thereto and upon argument the court sustained the amended demurrer and dismissed the cross bill as amended for want of equity. Theodore A. Poska, as conservator, prosecuted an appeal to the Supreme court on the theory that a freehold was involved, and also questioned the constitutionality of the Torrens act, under which the real estate in question was registered. The Supreme court, however, holding that a freehold was not involved and that a cause cannot be brought directly to that court upon the ground that the validity of a statute was involved unless the record discloses that the question was presented to the trial court for decision and preserved for review, refused to take jurisdiction and transferred the cause to this court for determination. (Lithuanian Alliance v. Home Bank & Trust Co., 362 Ill. 439.)

It appears from the amended cross bill that Felicia Poszka was adjudged insane March 23, 1922, in the County court of Cook county, Illinois, and committed to the Kankakee State Hospital where she has been confined ever since, never having been restored to reason since her commitment. It is further alleged that March 23, 1922, and prior thereto the legal title to the real estate under foreclosure was vested in the incompetent person and Frank A. Poszka, her husband, as joint tenants, free from any incumbrance, as evidenced by certificate of title issued by the registrar of titles of Cook county under date of December 2, 1920. The cross bill further alleges that following the adjudication of insanity, a warranty deed dated April 17, 1922, bearing an acknowledgment dated April 18, 1922, and purporting to convey the title and interest of the incompetent person in said real estate to one Paul Poszka, was filed for record in the registrar's office in Cook county, Illinois, May 23, 1922, and that Felicia Poszka, the insane person, did not execute, acknowledge or deliver said warranty deed and did not and could not authorize or empower any person to act for her with reference thereto,

and special damages thereto and upon whom the court awarded the amended damages and allowed the costs all as amended for want of equity. The court also, as above stated, proceeded in appeal to the Supreme Court on the theory that a husband was involved, and also questioned the constitutionality of the Taxation Act, under which the real estate in question was registered. The Supreme Court, however, held that a husband was not involved and that a cause cannot be brought directly to that court upon the ground that the validity of a statute was involved unless the record disclosed that the question was presented to the trial court for decision and preserved for review, referred to the jurisdiction and transferred the cause to this court for consideration. (Litchfield v. Litchfield, 100 Ill. 497.)

It appears from the amended record that the wife's name was assigned income March 22, 1922, in the County Court of Cook County, Illinois, and committed to the Cook County Jail where she has been confined ever since, never having been released to reason since her commitment. It is further alleged that March 22, 1922, and prior thereto the wife filed in the real estate under foreclosure was vested in the incompetent person and Frank A. Larkin, her husband, as joint tenants, in and to the same, as evidenced by a certificate of title issued by the Registrar of Titles of Cook County under date of March 22, 1922. The title was further alleged that the wife, the alleged claim of income, a mortgage dated April 17, 1922, bearing an endorsement dated April 17, 1922, and purporting to convey the title and interest of the husband to the person in said real estate to the wife, was filed for record in the Registrar's office in Cook County, Illinois, May 22, 1922, and that the wife, the husband, and the person, did not acknowledge or deliver said mortgage and did not and could not authorize or empower any person to act for her with reference thereto.

and that, if the deed bears her genuine signature, it was obtained by fraud.

It is further alleged that about November 14, 1924, Paul Poszka conveyed title to the premises to Home Bank & Trust Company, as trustee, under a trust agreement of that date, and that the beneficial owner under the agreement was Frank A. Poszka, husband of the incompetent person; that afterward, on or about August 25, 1927, Frank A. Poszka applied for a loan to the Lithuanian Alliance of America, who had actual notice and knowledge of the insanity and disability of Felicia Poszka, wife of the applicant; that the right, title and interest of the incompetent person in and to her share of the real estate is superior to the rights and interests of parties to this proceeding. The cross bill further alleged that said Felicia Poszka, insane, is seized in fee simple of an undivided one-half of said real estate, which is improved with a two-story brick store and flat building, commonly known as 3101 South Morgan street, and that Sophie Poszka, who claims to be the owner of an undivided one-half interest, and certain tenants are in possession of said premises; that Lithuanian Alliance of America and others claim some interest in the real estate which constitutes a cloud upon the title of said incompetent person and that its claims should be adjudicated to be a cloud on the title and removed by decree of court. The cross bill concludes by praying for the following relief:

(1) That the parts or shares belonging to cross-complainant and all other owners of said premises be settled and ascertained by the court;

(2) That a partition of the premises be made between cross-complainant and all other persons who shall appear to be owners of or interested therein according to their respective rights and interests;

(3) That commissioners be appointed to make a division and partition, or in case partition thereof cannot be made without prejudice to the owners that said premises be sold and the proceeds divided among the owners according to their respective interests;

(4) That the warranty deed from the insane person to Paul Poszka, the trust deed and other subsequent conveyances be

and that, if the deed were duly executed, it was executed by Frank.

It is further alleged that about November 14, 1927, Frank conveyed title to the premises to John Frank & Janet Frank, as trustees, under a trust agreement of that date, and that the beneficial owner under the agreement was Frank A. Frank, husband of the respondent person; that afterward, on or about August 3, 1927, Frank A. Frank applied for a loan to the Lithuanian Alliance of America, who had actual notice and knowledge of the identity and disability of Felicia Frank, wife of the applicant; that the same title and interest of the respondent person in and to the above described real estate is superior to the rights and interests of parties to this proceeding. The grant will further allege that said Felicia Frank, inasmuch as she is the wife of an undivided one-half of said real estate, which is improved with a two-story brick house and that building, commonly known as 111 North Western Street, and that Felicia Frank, who claims to be the owner of an undivided one-half interest, and certain benefits are in possession of said premises; that Lithuanian Alliance of America and others claim some interest in the real estate which constitutes a cloud upon the title of said respondent person and that the claims should be adjudicated to be a cloud on the title and removed by decree of court. The grant will continue

by praying for the following relief:

- (1) That the party or parties claiming to have some interest in said premises be notified and answered by the court;
- (2) That a partition of the premises be made between respondent and all other persons who shall answer to be removed or interested therein according to their respective interests;
- (3) That respondent be appointed as one of a division and partition of the premises be made between respondent and all other persons who shall answer to be removed or interested therein according to their respective interests;
- (4) That the court do such other and further things as may be required for the proper and efficient management of the premises.

declared fraudulent and void as to the rights of cross-complainant.

The principal question for determination is whether a paramount or adverse title can be adjudicated in a foreclosure proceeding. It is urged by cross-complainant that unless the court determines her claim to a paramount or adverse title in this proceeding that the foreclosure decree will forever bar her rights. It is a well settled rule of law, laid down by numerous decisions in this state, that where a cross bill is not germane to the original bill it is subject to demurrer. (People v. Fisher, 335 Ill. 406; Patterson v. Northern Trust Co., 231 Ill. 22; Smith v. Johnson, 321 Ill. 134; Dinsmoor v. Rowe, 200 Ill. 555.) It is also well settled that questions of adverse or paramount title cannot be litigated in a suit to foreclose a mortgage. We so held in the recent case of Chap v. Lithuanian National Catholic Church of America, case No. 37884, not reported. In that case one Dalrymple, a codefendant in the foreclosure proceeding, was served by publication predicated upon a false affidavit. Dalrymple claimed an adverse or paramount title and sought to file an intervening petition asking to be relieved from the effect of the decree on the theory that his right to a paramount title had been adjudicated in the foreclosure proceeding. The court denied him leave to intervene. Upon appeal the decree was reversed and the cause remanded with directions to allow the petition and for further proceedings thereon, upon the theory that his rights had been adjudicated adversely to him pursuant to a false affidavit of publication; that he was not a proper party to the proceeding because he claimed an adverse or paramount title, which could not be determined in a foreclosure suit, and that he was entitled to be dismissed from the proceeding in accordance with the prayer of his petition and to try his title in another and separate proceeding. Numerous cases cited

The principal question for determination is whether a
 permanent or permanent title can be established in a foreign
 proceeding. It is argued by counsel for the plaintiff that unless the
 court determines her of the permanent or permanent title in
 this proceeding that the foreign decree will have no effect
 rights. It is a well settled rule of law, that where a court
 decision in this state, that where a court will is not binding in
 the original title it is subject to a writ. (People v. ...)
 333 Ill. 406; ... v. ... 301 Ill. 55; ...
 v. ... 301 Ill. 55; ... v. ... 301 Ill. 55; ...
 also well settled that questions of adverse or permanent title
 cannot be litigated in a suit to enforce a mortgage, as in this
 in the recent case of ... v. ... Illinois ...
 of Mexico, case No. 17884, not reported. In that case one
 defendant, a defendant in the foreign proceeding, was named
 by plaintiff as defendant upon a false affidavit. Plaintiff claimed
 an adverse or permanent title and sought to file an intervening
 petition asking to be relieved from the effect of the decree in the
 theory that his right to a permanent title had been violated in
 the foreign proceeding. The court denied the leave to inter-
 vene. Upon appeal the decree was reversed and the court remanded
 with directions to allow the petition and for further proceedings
 thereon, upon the theory that his rights had been violated and
 verely to him pursuant to a false affidavit of plaintiff, that
 he was not a proper party to the proceeding because he claimed an
 adverse or permanent title, which could not be determined in a fore-
 ign proceeding, and that he was entitled to be admitted to the pro-
 ceeding in accordance with the prayer of his petition and to try
 his title in another and separate proceeding. Numerous cases cited

therein and in appellee's brief are to the same effect, and the rule is well established in this state that where a defendant to a bill for the foreclosure of a mortgage or trust deed sets forth in his answer that he has title to the property which is paramount and superior to that of a mortgagor and derived independently of the mortgagor, such defendant must be dismissed from the suit. In such case the court is without jurisdiction to pass upon and determine the validity of the defendant's claim to a paramount title.

(Bozarth v. Landers, 113 Ill. 181; Whitaker v. Irons, 300 Ill. 254; Gage v. Perry, 93 Ill. 176; Ennis v. Wolff, 194 Ill. 420, and cases cited therein.) It has even been held that the rule is applicable where the chancellor is of the opinion that such claim of prior or superior title is without substantial foundation. (Gage v. Perry, 93 Ill. 176; Bozarth v. Landers, 113 Ill. 181.) The only proper parties to a bill of foreclosure are the mortgagor, the mortgagee and those whose estates and liens have intervened since the execution and recording of the mortgage. (Whitaker v. Irons, 300 Ill. 254; Gage v. Perry, 93 Ill. 196.)

In Chap v. Lithuanian National Catholic Church of America, supra, Dalrymple was made a party defendant, and served. He sought to be dismissed from the proceeding so as not to have his claim of a paramount title adjudicated in the foreclosure proceeding, and we held that he was not a proper party and was entitled to be dismissed so that he might have his rights adjudicated in a separate proceeding. In the instant case cross-complainant was not made a party to the original proceeding but intervened and obtained leave of court to file her answer and cross bill, and she seeks in this foreclosure proceeding to have her claim of a paramount title adjudicated. Upon the same principle that was laid down in the Chap v. Lithuanian National Catholic Church of America and other cases cited, we are constrained to hold that the insane person's

therein and in appellant's brief was to the same effect, and the rule is well established in this state that where a defendant is a bill for the enforcement of a contract or trust does not in his answer that he has title to the property which is the subject of the mortgage and delivered independently of the mortgage, such defendant must be dismissed from the bill. In such case the court is without jurisdiction to pass upon the merits of the validity of the defendant's claim to a permanent title. (Boyle v. Landreth, 112 Ill. 181; Boyle v. Landreth, 200 Ill. 224; Boyle v. Landreth, 25 Ill. 176; Boyle v. Landreth, 104 Ill. 400, and cases cited therein.) It has even been held that the rule is applicable where the defendant is of the opinion that such claim of prior or superior title is without substantial foundation. (Boyle v. Landreth, 112 Ill. 181; Boyle v. Landreth, 200 Ill. 224; Boyle v. Landreth, 25 Ill. 176.) The only proper parties to a bill of foreclosure are the mortgagee, the mortgagee and those whose estate and interest have intervened since the execution and recording of the mortgage. (Boyle v. Landreth, 112 Ill. 181; Boyle v. Landreth, 200 Ill. 224; Boyle v. Landreth, 25 Ill. 176.) In Chap v. Litchman National Catholic Church of Chicago, 200 Ill. 224, the defendant was made a party defendant, and answer. He sought to be dismissed from the proceeding on the ground that he had no claim in a permanent title adjudicated in the foreclosure proceeding, and we held that he was not a proper party and was entitled to be dismissed to that he might have his rights adjudicated in a separate proceeding. In the instant case defendant was not made a party to the original proceeding but intervened and obtained leave of court to file her answer and cross bill, and the court in this foreclosure proceeding to have her claim as a permanent title adjudicated. Upon the same principle that was laid down in the Chap v. Litchman National Catholic Church of Chicago and other cases cited, we are constrained to hold that the instant parties

claim of a paramount or superior title cannot be determined in this foreclosure proceeding and that her cross bill was properly dismissed on demurrer for want of jurisdiction. That, however, does not defeat or affect her right to file a separate proceeding and have her claim of a paramount title heard and adjudicated in another suit.

It is next urged that the chancellor's ruling on the demurrer was based largely on the binding effect of registrations of title under the Land Titles act. Appellant argues that a deed made by a lunatic, being void, any subsequent certificates of title based thereon are likewise void, even as to innocent purchasers. In view of our conclusion that the court had no jurisdiction to try a paramount title in this proceeding, we refrain from passing on this point, especially in view of the fact that it will undoubtedly constitute one of the principal arguments to support cross-complainant's claim of paramount title in another proceeding.

The only other point raised relates to the constitutionality of the Torrens act. This question was disposed of by the Supreme court in Lithuanian Alliance v. Home Bank & Trust Co., 362 Ill. 439.

Finding no reversible error, the decree of the Superior court is affirmed.

AFFIRMED

Sullivan, P. J., and Scanlan, J., concur.

claim of a person or another title must be determined in this forensic proceeding and that the state will not recognize a claim on a claimer for want of jurisdiction. That, however, does not defeat or affect the right to file a separate proceeding and have her claim of a person title heard and adjudicated in another suit.

It is next urged that the Chancellor's ruling on the matter was based largely on the binding effect of restrictions of title under the land title act. Appellant argues that a deed made by a lunatic, being void, any subsequent restriction of title based thereon are likewise void, even as to innocent purchasers. In view of our conclusion that the court had no jurisdiction to try a question of title in this proceeding, we refrain from passing on this point, especially in view of the fact that it will undoubtedly constitute one of the principal arguments to be presented in the appeal of appellant's title in another proceeding.

The only other point raised relates to the admissibility of the Torrens act. This question was disposed of by the court in Williamson v. The State of Maryland, 189 (1895). Finding no reversible error, the action of the appellate court is affirmed.

WILLIAMSON

Williamson, P. J., and Connelley, J., concur.

38520

WILLIAM M. RICHARDS,
Appellee,

vs.

HARRY KAPLAN,
Appellant.

467
APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

287 I.A. 621³

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

An appeal by defendant from a judgment entered against him upon a verdict of a jury in an action of forcible entry and detainer finding him guilty of unlawfully withholding the premises in question from plaintiff. The premises involved are Apartment 1, 2142 N. Kedzie Avenue, Chicago, Cook County, Illinois. Defendant filed a plea of not guilty and demanded a jury trial.

Defendant offered no evidence. From plaintiff's evidence the following facts appear: On January 3, 1925, defendant and his wife, being the owners of certain property (a part of which is involved herein), conveyed the same to Foreman Trust & Savings Bank as trustee. On the same date the Bank entered into a trust agreement to hold the property for the benefit of defendant, Herman M. Lipman and Benjamin E. Cohen. Thereafter Cohen assigned his interest to defendant and Lipman, and on December 12, 1929, defendant and Lipman assigned their interests to Ella I. Lightfoot, who, on October 5, 1931, assigned her interest to plaintiff. On February 2, 1925, the Bank, as trustee, executed a trust deed securing a first mortgage loan on the property, and in October, 1930, a bill was filed to foreclose the trust deed. On March 22, 1932, a decree was entered finding that there was due complainant the sum of \$105,452.48, ordering a sale of the property to satisfy that amount, and continuing the receiver in possession to manage and operate the property and collect the rents. On March 26, 1932, at a master's sale held pursuant to the decree, the property was sold to Frances

WILLIAM M. RICHARDS,
Appellee,

vs.

HARRY RAPHAEL,
Appellant.

287 I.A. 621

MR. JUSTICE ROAMMAN DELIVERED THE OPINION OF THE COURT.

An appeal by defendant from a judgment entered against him upon a verdict of a jury in an action of forcible entry and detainer finding him guilty of unlawfully withholding the premises in question from plaintiff. The premises involved are apartment 1, 1142 E. 124th Avenue, Chicago, Cook County, Illinois. Defendant filed a plea of not guilty and demanded a jury trial.

Defendant offered no evidence. From plaintiff's evidence the following facts appear: On January 3, 1925, defendant was his wife, being the owners of certain property (a part of which is involved herein), conveyed the same to Foreman Trust & Savings Bank as trustee. On the same date the Bank entered into a trust agreement to hold the property for the benefit of defendant, Harry M. Lipman and Benjamin E. Cohen. Thereafter Cohen assigned his interest to defendant and Lipman, and on November 12, 1925, defendant and Lipman assigned their interest to William I. Lightfoot, who, on October 2, 1931, assigned his interest to plaintiff. On February 2, 1925, the Bank, as trustee, executed a trust deed securing a first mortgage loan on the property, and in October, 1930, a bill was filed to foreclose the trust deed. On March 23, 1932, a decree was entered finding that there was no complaint the sum of \$102,452.41, ordering a sale of the property to satisfy said amount, and continuing the receiver in possession to manage and operate the property and collect the rents. On March 25, 1932, at a master's sale held pursuant to the decree, the property was sold to Frances

M. Blakely for \$18,000. On June 25, 1932, plaintiff redeemed the property from the sale. On May 25, 1932, the Bank conveyed the property by its trustee's deed to plaintiff. The apartment in question is in an apartment building located on a part of that property. In October, 1929, defendant entered into a written lease with the Bank for the apartment at a monthly rental of \$100. It is admitted that since the expiration of the lease defendant has continued in possession of the apartment and still is in possession, without any new agreement. The evidence conclusively shows that he has not paid any rent for the apartment since February, 1930.

Upon the oral argument of the present appeal, the members of the court, impressed with the fact that defendant had paid no rent for the apartment since February, 1930, inquired of defendant's counsel what equitable defense, if any, defendant had to plaintiff's action, to which inquiry counsel replied that defendant's attitude was to defeat, if possible, any suit for possession of the apartment that plaintiff might bring against him.

Section 14 of the Landlord and Tenant Act (Ill. State Bar, Stats. 1935, ch. 80, par. 14) provides that the grantees of any demised lands, tenements, rents or other hereditaments, or of the reversion thereof, the assignees of the lessor of any demise, and the heirs and personal representatives of the lessor, grantee or assignee, shall have the same remedies by entry, action or otherwise, for the nonperformance of any agreement in the lease, or for the recovery of any rent, or for the doing of any waste or other cause of forfeiture, as their grantor or lessor might have had if such reversion had remained in him. In West Side Trust and Savings Bank v. Lopoten, 358 Ill. 631, 638-9, the court stated:

"The devisee or grantee of a lessor, by the express provisions of section 14 of the Landlord and Tenant act, may maintain an action of forcible detainer in his own name. The right of the respective plaintiffs in the illustrative cases cited presumably vested in those who had never been in the actual possession of the

premises. The manifest legislative intent disclosed by section 2 is that only in cases brought under the first clause is the action primarily one for re-possession, and that the remedy afforded by the remaining clauses is not restricted to those who were originally in possession of the land but also extends to the persons presently entitled to the possession after a demand in writing."

Under the evidence and the law, therefore, plaintiff succeeded to the rights of defendant's lessor, Foreman Trust and Savings Bank.

On January 18, 1933, plaintiff commenced a forcible detainer suit against defendant for the possession of the premises, and on March 28, 1933, obtained judgment. Defendant appealed to this court (Richards v. Kaplan, 274 Ill. App. 655, Abst.) and we reversed the judgment and remanded the cause for a new trial upon the ground that the evidence did not show that a demand in writing for the possession of the premises was ever made and served on the defendant as required by the statute, and upon the further ground that plaintiff had failed to prove that defendant was a "grantor in possession" of the premises described in the complaint, within the meaning of clause Sixth of Section 2 of the Forcible Entry and Detainer Act. From our opinion it appears that it was agreed by the parties that clause Sixth governed that appeal. After that judgment had been reversed and the cause remanded plaintiff retained new counsel, the suit in the Municipal court was nonsuited upon motion of plaintiff, and after plaintiff had served on defendant a demand for immediate possession of the premises the instant proceedings were commenced. The trial court refused to permit defendant to offer in evidence the transcript of the record filed in this court in the former proceeding, the opinion of this court therein, and the mandate, and defendant contends, if we understand his position correctly, that our judgment in the former proceeding is res judicata of the present suit. There is no merit in this contention. In the former case we did not finally adjudicate the rights of the parties but merely reversed the cause for a new trial. Plaintiff, in that proceeding, was, apparently,

premises. The manifest defect in the first clause is the fact that only in cases brought under the first clause is the action primarily one for re-possession, and that the remedy afforded by the remaining clauses is not restricted to those who were originally in possession of the land but also extends to the persons presently entitled to the possession after a demand in writing."

Under the evidence and the law, therefore, plaintiff succeeded to the rights of defendant's lessor, Foreman Trust and Savings Bank.

On January 18, 1938, plaintiff commenced a forcible detainer

suit against defendant for the possession of the premises, and on

March 28, 1938, obtained judgment. Defendant appealed to this court

(Richard v. Kasper, 274 Ill. App. 658, 660, 661) and reversed the

judgment and remanded the cause for a new trial upon the ground that

the evidence did not show that a demand in writing for the possession

of the premises was ever made and served on the defendant as re-

quired by the statute, and upon the further ground that plaintiff

had failed to prove that defendant was a "tenant in possession" of

the premises described in the complaint, within the meaning of

clause sixth of Section 2 of the Forcible Entry and Detainer Act.

From our opinion it appears that it was agreed by the parties that

clause sixth governed that appeal. After that judgment had been

reversed and the cause remanded plaintiff retained new counsel, the

suit in the Municipal court was nonsuited upon motion of plaintiff,

and after plaintiff had served on defendant a demand for immediate

possession of the premises the instant proceedings were commenced.

The trial court refused to permit defendant to offer in evidence the

transcript of the record filed in this court in the former proceed-

ing, the opinion of this court therein, and the mandate, and defendant

contends, it we understand his position correctly, that our judgment

in the former proceeding is res judicata of the present suit. There

is no merit in this contention. In the former case we did not

finally adjudicate the rights of the parties but merely reversed the

not informed that defendant had executed a lease as a tenant for the apartment, and therefore proceeded on the theory of "grantor in possession." After the cause was remanded the existence of the said lease became known to plaintiff's new counsel. The former proceeding was then nonsuited and the instant one commenced. Here plaintiff bases his right to possession under clauses Second and Fourth of Section 2 of the Act and Section 14 of the Landlord and Tenant Act. To admit the transcript, opinion and mandate would serve no useful purpose and would only tend to confuse the jury.

As plaintiff brings this action under clauses Second and Fourth of Section 2 of the Act and Section 14 of the Landlord and Tenant Act, it is unnecessary for us to notice several points raised by defendant that are based upon the assumption that plaintiff predicates his right to possession under clause Sixth of Section 2 of the Act.

Defendant argues that the evidence shows that after February, 1930, he paid his rent, that such holding over made him a year to year tenant, and cites Goldsborough v. Gable, 140 Ill. 269, and Weiss v. Danileczik, 262 Ill. App. 551, in support of his contention that where a tenant remains in possession after the expiration of the term described in the lease without any new contract with the landlord it is optional with the landlord to treat him as a trespasser or to waive the wrong and treat him as a tenant, and that by accepting the payment of rent thereafter the landlord makes his election and the tenant becomes a tenant of the premises from year to year, upon the same terms and subject to the same rent as is provided in the lease. The instant contention is based upon the assumption that defendant paid his rent to H. O. Stone & Company subsequent to February, 1930. An examination of the testimony of Gerald E. Riley, upon which defendant relies in support of his contention, satisfies us that the witness's statement that de-

not informed that defendant had executed a lease as a tenant for the apartment, and therefore proceeded on the theory of "tenant in possession." After the case was remanded the evidence of the said lease became known to plaintiff's new counsel. The former proceeding was then renewed and the instant one commenced. There plaintiff bases his right to possession under of lease second and fourth of Section 2 of the Act and Section 14 of the Landlord and Tenant Act. To admit the transcript, opinion and verdict would serve no useful purpose and would only tend to confuse the jury. As plaintiff brings this action under of lease second and fourth of Section 2 of the Act and Section 14 of the Landlord and Tenant Act, it is unnecessary for us to notice several points raised by defendant that are based upon the assumption that plaintiff predicated his right to possession under clause fifth of Section 2 of the Act. Defendant argues that the evidence shows that after February, 1930, he paid his rent, that when holding over after a year to year tenant, and cites Olden v. Gifford, 202 Ill. App. 2d, 202, and Wells v. Danilczak, 202 Ill. App. 2d, 202, in support of his contention that where a tenant remains in possession after the expiration of the term described in the lease without any new contract with the landlord it is optional with the landlord to treat him as a trespasser or to waive the wrong and treat him as a tenant, and that by accepting the payment of rent thereafter the landlord waives his election and the tenant becomes a tenant of one year from year to year, upon the same terms and subject to the same rent as is provided in the lease. The instant contention is based upon the assumption that defendant paid his rent to R. O. Stone & Company subsequent to February, 1930. An examination of the testimony of Gerald E. Riley, upon which defendant relies in support of his contention, reflects no such evidence.

defendant paid his rent after that date is based not upon any knowledge of the witness but upon his suppositions and conclusions. The jury were fully justified in finding from the testimony of Margaret Arlington, plaintiff and Henry S. Reichard that defendant did not pay any rent after February, 1930. Defendant had full opportunity to prove such payment if he made it. He did not do so.

"A tenancy from year to year cannot be inferred from the mere fact of a holding over by the tenant; the landlord must in some manner recognize the tenancy. The acquiescence of the landlord in the holding over may, however, be inferred from the circumstances, the question being one of fact. The acceptance of rent in accordance with the terms of the lease is evidence of such recognition, but a mere demand for rent which is not complied with is not conclusive of consent. The mere fact that the landlord takes no steps after the lease expires by its own terms to regain the possession is not an act from which the inference of the new tenancy may be drawn, unless the landlord has permitted the occupancy to continue for such a length of time as to imply assent." (35 C. J. 1103.)

"A tenancy from year to year can not be inferred from the mere fact of holding over; the landlord must, in some manner, recognize the tenancy. If, after the lease expired, the landlord should agree upon a term, or receive rents, or recognize the party holding over as his tenant, these and kindred facts might be regarded as facts from which a tenancy might be created. But the mere fact that the landlord takes no steps, after the lease expires by its own terms, to regain the possession, can not be regarded as an act from which an inference of a new tenancy could be drawn." (Cairo & St. L. R. R. Co. v. Wiggins Ferry Co., 82 Ill. 230, 233.)

"In Weber v. Powers, 213 Ill. 370, 382, it is said: 'Where a tenant for a year or years holds over after the expiration of his lease, without having made any new arrangement with his landlord under which such holding over takes place, the landlord, at his election, may treat the tenant as a trespasser, or as a tenant for another year, upon the same terms as in the original lease, and this though the tenant has no intention of holding over for a year, or of paying the same rent. The law fixes the tenant's liability for holding over, independent of his intention. The legal presumption of a renewal from the holding over cannot be rebutted by proof of a contrary intention on the part of the tenant alone. (Clinton Wire Cloth Co. v. Gardner, 99 Ill. 151.) The right of election as to whether the tenant, remaining in possession after the expiration of the lease, is holding over upon the same terms as in the original lease is a right, which belongs to the landlord, and not to the tenant. It is the landlord alone, whose intention on the subject is to be ascertained, as it is he alone, who may elect to treat the tenant as holding over under the terms of the old lease. (Keegan v. Kinnare, 123 Ill. 280.)" (Weiss v. Danilczik, 262 Ill. App. 551, 556.)

The argument of defendant that plaintiff, by lapse of time, is precluded from electing to treat defendant as a trespasser, is without

tenant paid his rent after that date is based not upon any knowledge of the witness but upon his suppositions and conclusions. The jury were fully justified in finding from the testimony of Mr. Arlington, plaintiff and Henry S. Reichard that defendant did not pay any rent after February, 1934. Defendant had full opportunity to prove such payment if he made it. He did not do so.

"A tenancy from year to year cannot be inferred from the mere fact of a holding over by the tenant; the landlord must in some manner recognize the tenancy. The recognition of the landlord in the holding over may, however, be inferred from the circumstances, the question being one of fact. The recognition of rent in accordance with the terms of the lease is evidence of such recognition, but a mere demand for rent which is not complied with is not conclusive of consent. The mere fact that the landlord takes no steps after the lease expires by its own terms to regain the possession is not an act from which the inference of the new tenancy may be drawn, unless the landlord has permitted the occupancy to continue for such a length of time as to imply assent." (25 C. J. 1103.)

"A tenancy from year to year cannot be inferred from the mere fact of holding over; the landlord must, in some manner, recognize the tenancy. If, after the lease expires, the landlord should give upon a term, or receive rents, or recognize the party holding over as his tenant, these are implied facts which are regarded as facts from which a tenancy might be inferred. But the mere fact that the landlord takes no steps, after the lease expires by its own terms, to regain the possession, can not be regarded as an act from which an inference of a new tenancy could be drawn." (Cairo & St. L. Ry. v. Williams, 230 Ill. 230, 233.)

"In Weber v. Powers, 213 Ill. 170, 171, it is said: 'Where a tenant for a year or years holds over after the expiration of his lease, without having made any new arrangement with his landlord under which such holding over takes place, the landlord, by his election, may treat the tenant as a trespasser, or as a tenant for another year, upon the same terms as in the original lease, and this though the tenant has no intention of holding over for a year, or of paying the same rent. The law treats the tenant's holding over as a new lease, independent of his intention. The legal presumption of a new lease from the holding over cannot be rebutted by proof of a contrary intention of the party at the time of expiration of the lease. Fire Glider Co. v. Gurnham, 99 Ill. 131. The right of election to whether the tenant, holding over, shall be treated as a trespasser or as a tenant for another year upon the same terms as in the original lease, is a right which belongs to the landlord, and not to the tenant. It is the landlord alone, whose election on the subject is to be ascertained, as it is he alone who may elect to treat the tenant as holding over under the terms of the old lease.' (Reichard v. Arlington, 123 Ill. 280.)"

The argument of defendant that plaintiff, by lapse of time, is precluded from electing to treat defendant as a trespasser, is without

merit. (See Cairo & St. L. R. R. Co. v. Wiggins Ferry Co., *supra*.) Moreover, the record conclusively shows that plaintiff has endeavored for a number of years to dispossess defendant and that the latter has retained possession of the apartment not because of any equitable right he has, but solely because of the ingenuity of his counsel.

In the instant case one of the interrogatories filed by plaintiff reads: "With respect to this apartment, were you ever a tenant of William M. Richards?" to which defendant answered, "No." Counsel for defendant, in his opening statement to the jury, stated that the evidence would show that plaintiff was not defendant's landlord. As defendant denies the fact of tenancy, forcible detainer would lie against him even though there had been no notice to quit or demand for possession made before beginning the action. (See Gentle v. Butler, 278 Ill. App. 371, 375-6; Tole v. Tole, 149 Ill. App. 311, 315-6.)

Defendant contends that the court erred in refusing to give instructions tendered by him and in giving instructions tendered by plaintiff. After a consideration of the said instructions we have reached the conclusion that there is no merit in the contention.

Neither in the first proceeding nor in the instant one did defendant offer any evidence or interpose any equitable defense. As plaintiff strenuously argues, defendant seems to rely solely upon the ability of his counsel to find technical defects in the proceedings by means of which defendant may retain possession of another man's property without paying any rent for the same. Defendant's attitude does not appeal to our sense of justice.

The judgment of the Municipal court of Chicago is affirmed.

JUDGMENT AFFIRMED.

Sullivan, P. J., and Friend, J., concur.

v. Tole, 149 Ill. App. 311, 312-3.)
the action. (See Gentile v. Winter, 275 Ill. App. 371, 372-3; Bo
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JANE ANNE SLAUGHTER, by
E. M. Slaughter, her father
and next friend,

Appellee,

v.

EXPOSITION GATEWAY PARKING
CORPORATION, a corporation,
et al.,
Defendants.

APPEAL FROM CIRCUIT
COURT, COOK COUNTY.

EXPOSITION GATEWAY PARKING
CORPORATION, a corporation,
Appellant.

287 I.A. 621⁴

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Plaintiff, by her next friend, sued defendants, Exposition Gateway Parking Corporation, a corporation, Joel Johnson, Charles Powell and Mabel Powell, in case. The only defendant served was Exposition Gateway Parking Corporation, a corporation, hereinafter called defendant. A jury returned a verdict finding defendant guilty and assessing plaintiff's damages in the sum of \$40,000. Defendant appeals to reverse a judgment entered upon the verdict.

The first count of plaintiff's declaration charges, in substance, that plaintiff, on August 11, 1933, was a pedestrian on Columbus Drive, at or near the 18th street entrance of the Century of Progress Exposition Grounds, Chicago; that she was then and there and at all times in the exercise of due care and caution for her own safety; that defendant and Joel Johnson were then and there driving, operating and managing a certain motor vehicle in a northerly direction on said drive and that it was the duty of said defendants while driving, operating and managing the motor vehicle

JANE ANN SLAUGHTER, by
J. K. Slaughter, her father
and next friend,
Appellee,

v.

EXPOSITION GATEWAY PARKING
CORPORATION, a corporation,
et al.,
Defendants.

EXPOSITION GATEWAY PARKING
CORPORATION, a corporation,
Appellant.

MR. JUSTICE ROSSMAN DELIVERED THE OPINION OF THE COURT.

Plaintiff, by her next friend, and defendants, Exposition Gateway Parking Corporation, a corporation, Joel Johnson, Charles Powell and Mabel Powell, in case. The only defendant served was Exposition Gateway Parking Corporation, a corporation, hereinafter called defendant. A jury returned a verdict finding defendant guilty and assessing plaintiff's damages in the sum of \$40,000. Defendant appeals to reverse a judgment entered upon the verdict. The first count of plaintiff's declaration charges, in substance, that plaintiff, on August 11, 1938, was a pedestrian on Columbus Drive, at or near the 1350 street entrance of the Century of Progress Exposition grounds, Chicago; that she was then and there and at all times in the exercise of the care and caution for her own safety; that defendant, Joel Johnson, was then and there driving, operating and managing a certain motor vehicle in a northerly direction on said drive and that it was the duty of said defendants while driving, operating and managing the motor vehicle

WILLIAM E. CLAYTON
ATTORNEY AT LAW
CHICAGO, ILL.

287 I.A. 621

to do so with due care and caution, but that defendants so carelessly, recklessly and negligently drove, operated and managed the said motor vehicle that the same ran into, against and upon plaintiff, causing injury to her, etc. The second count, after alleging due care and caution on the part of plaintiff, charges, in substance, that defendant was driving a certain motor vehicle over and upon Columbus Drive by and through its agent, employee or servant, Joel Johnson, who was then and there acting within the scope of his employment, and that defendant, through its said agent, etc., so carelessly, recklessly and negligently drove, operated and managed the automobile that it ran into, against and upon plaintiff, causing injury to her, etc. The third count was directed against defendant Johnson only. Defendant filed a plea of general issue and a special plea in which it averred that at the time of the committing of the grievances laid to its charge in the declaration defendant did not own, control, manage or operate the automobile as alleged, "nor was the person operating the automobile as alleged by plaintiff in the employ of or subject to any direction or supervision of this defendant and was not engaged in the furtherance of any business for this defendant." Plaintiff filed a replication to the special plea.

Defendant offered no evidence but tendered a written motion for an instructed verdict of not guilty, which was denied. No point is raised as to the pleadings. Defendant admits that plaintiff was very seriously injured, and does not question the amount of the verdict.

Defendant contends that the trial court should have allowed defendant's motion for a directed verdict because the uncontradicted evidence shows "that Joel Johnson, the colored porter, in the general employ of the defendant, was not at the time of the occurrence of this accident engaged in the master's business, since he was at that time and place acting outside of the scope of his employment. In

to do so with due care and attention, but that defendant did not do so with due care and attention, and that defendant was negligent, recklessly and negligently drove, operated and managed the said motor vehicle that on June 22, 1934, against and upon Plaintiff, causing injury to her, etc. The second count, after alleging that defendant was negligent, recklessly and negligently drove, operated and managed the automobile that it ran into, against and upon Plaintiff, causing injury to her, etc. The third count was directed against defendant Johnson only. Defendant filed a plea of general issue and a plea in which it averred that at the time of the commission of the grievances laid to its charge in the Declaration defendant did not own, control, manage or operate the automobile in which, "nor was the person operating the automobile as alleged by Plaintiff in the employ of or subject to any direction or supervision of this defendant and was not engaged in the business of any business for the defendant." Plaintiff filed a replication to the special plea. Defendant offered no evidence but tendered a written motion for an instructed verdict of not guilty, which was denied. No point is raised as to the pleadings. Defendant asks that Plaintiff be very seriously injured, and could not question the amount of the verdict. Defendant contends that the trial court should have allowed defendant's motion for a directed verdict because the uncontested evidence shows "that Joel Johnson, the colored porter, in the employ of the defendant, was not at the time of the accident at this accident engaged in the motor's business, since he was at that time and place acting outside of the scope of his employment. In

order to determine whether or not Joel Johnson was acting in or outside the scope of his employment, reference need be had to the evidence of two witnesses only - Truman H. Miner, an officer of the defendant corporation and Joel Johnson, the driver of the automobile." It may be conceded that in determining the instant contention only the testimony of Miner and Johnson need be considered. Both witnesses were called by plaintiff, under section 60 of the Practice act. Truman H. Miner is an attorney at law, practicing at the Chicago bar, but at the time in question was an officer and manager of defendant corporation. Defendant contends that Johnson was not a party to the suit because he was not served with summons; that when plaintiff called him as a witness she vouched for his testimony and his evidence as to the nature and scope of his employment is binding on plaintiff. Assuming, for the purposes of this case, that Johnson was not a party to the action, nevertheless, plaintiff was not bound by his testimony. (See Chance v. Kinsella, 310 Ill. 515, 523. See also Kovell v. North Roseland Motor Sales, 275 Ill. App. 566 [certiorari denied by the Supreme court, id. xiii], and cases therein cited.) Johnson, a colored boy, had just completed his first year in high school at the time of the accident. He was employed by Miner early in July. The accident happened August 11, 1933, but Miner retained him in the employ of defendant until he voluntarily left, about September 18, to again enter school. Miner testified that he hired Johnson to act as porter on the lot; "he was a watchman on the lot, to see that no cars were stolen, mainly; that was his main job. The next job was to keep the lot cleaned up, keep the papers and the tin cans and lunch boxes cleaned up, and burned up or thrown away; and keep the parking office clean. That's what he was hired for and those were his duties. He was told never to drive any cars for

order to determine whether or not Joel Johnson was acting in or outside the scope of his employment, reference need be had to the evidence of two witnesses only - Truman H. Miner, an officer of the defendant corporation and Joel Johnson, the driver of the automobile. It may be conceded that in determining the instant contention only the testimony of Miner and Johnson need be considered. Both witnesses were called by Plaintiff, under section 60 of the Practice act. Truman H. Miner is an attorney at law, practicing at the Chicago bar, but at the time in question was an officer and manager of defendant corporation. Defendant contends that Johnson was not a party to the suit because he was not served with summons; that when Plaintiff called him as a witness she vouched for his testimony and his evidence as to the nature and scope of his employment is binding on Plaintiff. Assuming, for the purposes of this case, that Johnson was not a party to the action, nevertheless, Plaintiff was not bound by his testimony. (See Chance v. Kincaid, 210 Ill. 512, 522. See also Novell v. North Highland Motor Sales, 275 Ill. App. 202, 203 [last sentence] denied by the supreme court, 40 Ill. 2d 511, and cases therein cited.) Johnson, a colored boy, had just completed his first year in high school at the time of the accident. He was employed by Miner early in July. The accident happened August 11, 1935, but Miner vouched him in the employ of defendant until he voluntarily left, about September 18, to again enter school. Miner testified that he hired Johnson to act as porter on the lot; "he was a watchman on the lot, to see that no cars were stolen, mainly; that was his main job. The next job was to keep the lot cleaned up, keep the papers and the cans and lunch boxes cleaned up, and burn up or throw away; and keep the parking office clean. That's what he was hired for and there were his duties. He was told never to have any cars for

customers;" that at the time he employed Johnson he told him not to drive cars and repeated that direction to him many times. Johnson testified that his duties were to clean the parking lot and to direct the "customers" where to park; that he did not have anything to do with the driving of automobiles, that Miner had instructed him not to drive them, and when he drove the Powell automobile upon the occasion in question he knew that he did not have any right to drive it. If this testimony of Miner and Johnson, ^{which} upon defendant is forced to rely in support of its contention, were all the evidence in the case as to the nature and scope of the employment of Johnson, there would be merit in defendant's position, but plaintiff succeeded in eliciting from Miner and Johnson, hostile witnesses, facts and circumstances that, in our judgment, clearly rebut the theory of fact of defendant as to the nature and scope of Johnson's work. Defendant employed a number of white boys, and Miner admitted that they were allowed to solicit business in front of the parking lot of defendant; that if parties in automobiles, when they stopped in front of defendant's parking lot, would not immediately drive into the lot, these boys would then get on the automobiles and accompany the parties until they reached an entrance to the Fair, whereupon the boys would give a receipt to the parties and bring the automobiles back to the parking lot; that that happened "quite often," "nearly every day, but with no authority assumed on the part of the Exposition Gateway Parking Corporation." But Miner finally conceded that the white boys "drove cars with my knowledge and consent." Colored people patronized defendant's lot and Johnson was the only colored boy employed by defendant. Johnson testified that he "drove cars back from the World's Fair to the parking lot a great many times," "pretty nearly every day." It appears that he had parking tickets in his possession and he gave one to the Powells, the owners of the car in question, after they

customers;" that at the time he employed Johnson he told him not to drive cars and requested that he be taken to him many times. Johnson testified that his duties were to clean the parking lot and to direct the "customers" where to park, that he did not have anything to do with the driving of automobiles, that Miner had instructed him not to drive them, and when he drove the two automobiles upon the occasion in question he knew that he did not have any right to drive it. If this testimony of Miner and Johnson, upon which defendant is forced to rely in support of its contention, were all the evidence in the case as to the nature and scope of the employment of Johnson, there would be merit in defendant's position, but plaintiff succeeded in eliciting from Miner and Johnson, no less witnesses, facts and circumstances that, in our judgment, clearly rebut the theory of fact of defendant as to the nature and scope of Johnson's work. Defendant employed a number of white boys, and Miner admitted that they were allowed to solicit business in front of the parking lot of defendant; that in parties in automobiles when they stopped in front of defendant's parking lot, would not immediately drive into the lot, these boys would then get on the automobiles and accompany the parties until they reached an entrance to the fair, whereupon the boys would give a receipt to the parties and bring the automobiles back to the parking lot; that they were "quite often," "nearly every day, but with no regularity" on the part of the Exposition Gateway Parking Corporation." Not later than the testimony that the white boy "drove cars with my introduction and consent." Colored people patronized defendant's lot and Johnson was the only colored boy employed by defendant. Johnson testified that he "drove cars back from the hotel's lot to the parking lot a great many times," "pretty nearly every day." It appears that he had parking tickets in his possession and he gave one to the Powell, the owners of the car in question, after they

got out of their automobile at the Fair entrance. Miner admitted that a few days after he employed Johnson he learned from the white boys that Johnson was riding on cars to the entrances of the Fair and then driving the cars back to the lot; that on subsequent occasions prior to the accident he learned that Johnson was continuing that practice. He testified that whenever he was told that Johnson was driving cars he would tell him that he must not do that, that he must not touch the cars; that he told him this a dozen different times, "a good many times;" that "Johnson was never allowed to go off the lot, so far as his instructions were concerned." After the accident Johnson, upon returning to the parking lot, told Miner all about the accident, but Miner kept him in the employ of defendant until he voluntarily left, about the middle of September, although Miner admitted that he knew that Johnson, after the accident, was still driving cars for "customers." Miner testified that on the day in question he saw Johnson "go out and talk to the colored people [Powells] in the car" and saw him get on the running board; that he expected the colored people and Johnson would go around 24th street to the rear of the lot where they could enter and park, that when he saw them go "toward the 23rd Street gate" he assumed that Johnson was going to that gate; that Johnson, accompanied by several South Park officers, came back in about an hour to the parking lot in the Powell automobile, which was then parked on the lot, where it remained for several days; that Johnson upon his return told him that he hit somebody. Defendant argues that the police officers drove the car back to the lot, but Johnson finally admitted that he drove the car back to the lot. He also testified that upon his return to the lot he told Miner "what happened." Although Miner testified that he had told Johnson not to handle cars, nevertheless, it is apparent that he permitted him to solicit the business of the Powells, and he made no effort

Get out of their automobile at the fair entrance. Miner testified that a few days after he employed Johnson he learned from the white boys that Johnson was riding on cars to the entrances of the fair and then driving the cars back to the lot; that on subsequent occasions prior to the accident he learned that Johnson was continuing that practice. He testified that whenever he was told that Johnson was driving cars he would tell him that he must not do that, that he must not touch the cars; that he told him this a dozen different times, "a good many times"; that "Johnson was never allowed to go off the lot, so far as his instructions were concerned." After the accident Johnson, upon returning to the parking lot, told Miner all about the accident, but Miner kept him in the employ of defendant until he voluntarily left, about the middle of September, although Miner admitted that he knew that Johnson, after the accident, was still driving cars for "customers." Miner testified that on the day in question he saw Johnson "go out and talk to the colored people [Powells] in the car" and saw him get on the running board; that he expected the colored people and Johnson would go around 24th street to the rear of the lot where they could enter and park, that when he saw them go "toward the Third Street Gate" he assumed that Johnson was going to that gate; that Johnson, accompanied by several South Park officers, came back in about an hour to the parking lot in the Powell automobile, which was then parked on the lot, where it remained for several days; that Johnson upon his return told him that he had somebody, defendant, and argues that the police officers drove the car back to the lot, but Johnson finally admitted that he drove the car back to the lot. He also testified that upon his return to the lot he told Miner "what happened." Although Miner testified that he had told Johnson not to handle cars, nevertheless, it is apparent that he permitted him to solicit the business of the Powells, and he made no effort

to prevent him from accompanying the Powells as they drove away from the front of the premises of defendant.

Defendant argues that their business was only receiving cars for parking, but the evidence shows clearly that when it was necessary, to secure the patronage of automobilists, defendant offered them the additional service of delivery of the car from the Fair entrance to the lot. Indeed Miner admitted that this was true as to the services rendered by the white boys. It is evident that defendant could not have secured any considerable number of automobilists to park with it if they were forced to walk from its lot to the various entrances of the Fair located north of the lot. The Powells are colored people. Members of that race patronized defendant's lot, and the jury might reasonably infer from the evidence that Miner thought that Johnson was more likely to secure the patronage of colored people than the white boys. It is somewhat significant that defendant did not see fit to call any of the white boys that were employed in its service.

In determining whether a servant is acting within the scope of his employment all of the facts and circumstances surrounding his relationship with his employer must be considered. The jury were fully justified in finding that Johnson, notwithstanding the alleged instructions he received from Miner, was allowed by Miner to solicit patronage in the same way that the white boys did, and that it was part of the regular service given patrons by defendant to have the boys, including Johnson, drive cars from the parking lot to the entrances of the Fair; and the jury were also justified in finding that defendant, knowing the services that Johnson was rendering to its patrons, received the benefit of the business he obtained. Johnson testified that he did not know the Powells, and there is no contention that he was engaged on a personal errand when he accompanied them to the 23d street entrance. It would be a strange

to prevent him from accompanying the Towells as they drove away from the front of the premises of defendant.

Defendant argues that their business was only receiving calls for parking, but the evidence shows clearly that when it was necessary, to secure the patronage of automobilists, defendant offered them the additional service of delivery of the car from the rear entrance to the lot. Indeed, Miner admitted that this was true as to the services rendered by the white boys. It is evident that defendant could not have secured any considerable number of automobilists to park with it if they were forced to walk from its lot to the various entrances of the fair located north of the lot. The Towells are colored people. It is reasonably clear from the evidence that Miner thought that Johnson was more likely to secure the patronage of colored people than the white boys. It is somewhat significant that defendant did not see fit to call any of the white boys that were employed in the service.

In determining whether a servant is acting within the scope of his employment all of the facts and circumstances surrounding his relationship with his employer must be considered. The jury were fully justified in finding that Johnson, notwithstanding the alleged instructions he received from defendant, was allowed to solicit patronage in the same way that the white boys did, and that it was part of the regular service given patrons of defendant to have the boys, including Johnson, drive them from the rear lot to the entrance of the fair; and the jury were also justified in finding that defendant, knowing the service that Johnson was rendering to his patrons, received the benefit of the business so obtained. Johnson testified that he did not know the Towells, and that he had no recollection that he was ordered on a particular errand when he accompanied them to the 5th street entrance. It would be a strange

rule of law if defendant, under the facts, could escape responsibility for the act of Johnson merely by showing that it often instructed him not to drive the cars. The facts in the instant case illustrate the wisdom of the old adage that "actions speak louder than words." Johnson was not discharged after he had injured plaintiff, although Miner knew that he was still disregarding the alleged instructions, and he left the employ of defendant of his own volition about September 18, about the time his school term commenced.

In support of its position defendant cites such cases as Nelson v. Stutz, 341 Ill. 387; Rupp v. Walgreen Co., 270 Ill. App. 346; Reilly v. Connable, 214 N. Y. 586, and Fogel v. 1324 North Clark St. Bldg. Corp., 278 Ill. App. 286. These cases differ materially from the instant one on the facts. We are satisfied that the instant contention cannot be sustained.

Defendant does not contend that Johnson was not guilty of negligence at the time and place in question, but it insists that "plaintiff was guilty of contributory negligence." Plaintiff was fourteen years of age at the time of the accident and lived at Hollis, Oklahoma, where she was a pupil in the grade school. In August, 1933, she, together with Helen Briscoe, her teacher, and Aline Stotts, a schoolmate, also residents of Hollis, came to Chicago to attend the World's Fair. None had ever been in Chicago before that time. They stopped at the Flamingo hotel, on the south side. On Friday, August 11, they went to the Fair and about two o'clock P.M. they left it at the 18th street entrance, intending to go to the hotel. Directly west of the Fair grounds is Columbus Drive, used only for north-bound traffic. West of Columbus Drive is South Parkway, used for south-bound traffic. At the 18th street entrance to the Fair there was a viaduct, or bridge, over Columbus Drive. At the same entrance there was a stairway that led to the Columbus Drive street level. Plaintiff and her party descended the stairway intending to catch a

rule of law if defendant, under the facts, could escape responsibility for the act of Johnson merely by showing that it often instructed him not to drive the car. The facts in the instant case illustrate the wisdom of the old adage that "actions speak louder than words." Johnson was not discharged after he had injured Plaintiff, although Plaintiff knew that he was still discharging the alleged trust, and he left the employ of defendant of his own volition about September 18, about the time his school term commenced.

In support of its position defendant cites such cases as Johnson v. State, 241 Ill. 387; Rupp v. Wilson, 230 Ill. App. 240; Reilly v. Commonwealth, 214 N. Y. 586, and Lowell v. 13th North, 278 Ill. App. 286. These cases differ materially from the instant one on the facts. It is contended that the instant contention cannot be sustained.

Defendant does not contend that Johnson was not guilty of negligence at the time and place in question, but it insists that "Plaintiff was guilty of contributory negligence." Plaintiff was fourteen years of age at the time of the accident and lived at Hollis, Oklahoma, where she was a pupil in the grade school. In August, 1933, she, together with Helen Brooks, her teacher, and Line Potts, a schoolmate, also residents of Hollis, came to Chicago to attend the World's Fair. None had ever been in Chicago before that time. They stopped at the Lamirgo Hotel, on the south side. On Friday, August 11, they went to the Fair and about 7 o'clock P. M. they left it at the 18th street entrance, intending to go to the hotel. Directly west of the Fair grounds is Columbus Drive, used only for north-bound traffic. East of Columbus Drive is South Parkway, used for south-bound traffic. At the 18th street entrance to the Fair there is a viaduct, or bridge, over Columbus Drive. At the same entrance there was a stairway that led to the Columbus Drive street level. Plaintiff and her party descended the stairway to the street level.

south-bound bus back to their hotel. Upon a prior trip they had entered the Fair at the 18th street entrance and in reaching the entrance they had ascended the same stairway. None of the party knew that Columbus Drive was used only for north-bound traffic. When the party reached the street level they looked for a bus sign, but saw none, and they then sought a policeman, to make inquiries, and they saw one on the west side of the street, "walking back and forth." Miss Briscoe, Miss Stotts and plaintiff all testified that traffic upon Columbus Drive was very light at the time. It was a bright, sunny afternoon. Miss Briscoe testified that when she started westward across Columbus Drive, "there wasn't an automobile or a vehicle of any kind within a block or two of the 18th Street entrance and I started walking straight across west;" that plaintiff was walking across a few feet behind her; that she, the witness, was just across the street when she heard a noise, looked back, and plaintiff was pinned under the car; that when she reached the west curb plaintiff was right close behind her; that at the time she did not see any other automobile around there, although she looked; that the car in question was the only one "anywhere near;" that men who came up after the accident had to raise the car to get plaintiff out. Aline Stotts testified that she saw Miss Briscoe crossing the street and plaintiff "was right behind her;" that they were walking west and facing west; that as they crossed "there were two or three cars far down the street, a block or two away;" that she "didn't see a car anywhere around near them;" that when she first saw the car in question "it was about a half or two-thirds of a block away. It was probably farther than that;" that when she first saw that car plaintiff and Miss Briscoe were about three-fourths of the way across the drive; that no horn was blown; that she saw Miss Briscoe get across and thought plaintiff was across; that she "glanced up and the car had struck her that quick;" that she then saw plaintiff "under the

south-bound one back to North 1st. When a trial trip they had entered the car at the 13th street entrance and in ascending the entrance they had ascended the same stairway. None of the party knew that Columbus Drive was used only for north-bound traffic. When the party reached the street level they looked for a bus lane, but saw none, and they then sought a policeman, to make inquiries, and they saw one on the west side of the street, "walking back and forth." Miss Briscoe, Miss Stott and plaintiff all testified that traffic upon Columbus Drive was very light at the time. It was a bright, sunny afternoon. Miss Briscoe testified that when she started westward across Columbus Drive, "there wasn't an automobile or a vehicle of any kind within a block or two of the 13th street entrance and I started walking straight across west; that plaintiff was walking across a few feet behind her; that she, the witness, was just across the street when she heard a noise, looked back, and plaintiff was pinned under the car; that when she reached the west curb plaintiff was right close behind her; that at the time she did not see any other automobile around there, although she looked; that the car in question was the only one "anywhere near;" that when she came up after the accident had to raise the car to get plaintiff out. Alene Stott testified that she saw Miss Briscoe crossing the street and plaintiff "a right behind her;" that they were walking west and facing west; that as they crossed "there were two or three cars far down the street, a block or two away;" that she "didn't see a car anywhere around near them;" that when she first saw the car in question "it was about a half or two-thirds of a block away. It was probably farther than that;" that when she first saw that car plaintiff and Miss Briscoe were about three-fourths of the way across the drive; that no horn was blown; that she saw Miss Briscoe get across and thought again it was across; that she "leaped up and the car had struck her just quick;" that she and plaintiff "under the

car right alongside of the west curb." Plaintiff testified that she started across Columbus driveway with Miss Briscoe; that before doing so she looked up the street both ways and saw no car very close; that she could see a block but did not see any automobiles coming in the block south of her; that "there were no cars there at all;" that she did not see the automobile before it struck her. Columbus Drive is a four-lane driveway. Johnson testified that after he left the Powells at the 23d street entrance he tried to turn south at that point to return to the lot, but a police officer told him to continue northward and he did so; that he drove northward in the westerly lane at the rate of ten or fifteen miles an hour; that he intended to turn south again at the stadium and return to the parking lot; that the traffic on Columbus Drive at that time was heavy, - traffic ahead of him, behind him, and on the side; that because of it he did not see plaintiff until she was about four feet in front of his car; that at the time he first saw her she was "about six feet from the west curb;" that he did not have time to sound his horn but he "put on the emergency and foot brakes" and stopped the car in about ten feet; that when he got out of his car he found plaintiff between the two wheels; that he has good eyesight, does not wear glasses, and that prior to the accident he did not see plaintiff nor anybody else cross the street although he was looking up the road all the time.

The jury were fully warranted in believing the testimony for plaintiff as to the traffic situation on the street at the time of and just prior to the accident. It is a reasonable inference from the evidence that because Johnson was not permitted to turn the automobile southward at the 23rd street entrance and was compelled by the order of the officer to go northward as far as the stadium before he could turn southward, he drove his car at a high rate of speed in his haste to return to the parking lot. Miner testified ~~that~~

can right alongside of the west curb." Plaintiff testified that she started across Columbus driveway at the time that Johnson was looking up the street both ways and saw no car very close; that she could see a black but did not see any automobiles coming in the block south of her; that there were no cars there at all; that she did not see the automobile before it struck her. Columbus Drive is a four-lane driveway. Johnson testified that after he left the Powell at the 23d street entrance he tried to turn south at that point to return to the lot, but a police officer told him to continue northward and he did so; that he drove northward in the westerly lane at the rate of ten or fifteen miles an hour; that he intended to turn south again at the stadium and return to the parking lot; that the traffic on Columbus Drive at that time was heavy; traffic ahead of him, behind him, and on the side; that because of it he did not see plaintiff until she was about four feet in front of his car; that at the time he first saw her she was "about six feet from the west curb"; that he did not have time to sound his horn but he "put on the emergency and foot brake" and stopped the car in about ten feet; that when he got out of his car he found plaintiff between the two wheels; that he saw good daylight, does not wear glasses, and that prior to the accident he did not see plaintiff nor anybody else cross the street although he was looking up the road all the time. The jury were fully warranted in believing the testimony for plaintiff as to the traffic situation on the street at the time of and just prior to the accident. It is a reasonable inference from the evidence that because Johnson was not permitted to turn the automobile northward at the 23d street entrance and was compelled by the order of the officer to go northward as far as the stadium before he could turn southward, he drove his car at a high rate of speed in his haste to return to the parking lot. This testified ~~xxxxxxxx~~

that the "customers" sometimes gave tips to the boys when the latter drove the cars back. When Miss Stotts, standing on the east curb, first saw the car coming it was about a half or two-thirds of a block away and plaintiff and Miss Briscoe then had only ten feet to walk before they reached the west curb, yet the automobile was upon plaintiff when she had covered only four feet of that distance. According to plaintiff's evidence this four-lane driveway was practically free from traffic at the time, and no person, however careful she might be, could anticipate that she would be run down in the westerly lane, a few feet from the curb, by a north-bound automobile. The conduct of Johnson in striking plaintiff, when he had, according to plaintiff's evidence, abundant space available to pass to the right of her, amounted to gross negligence. Plaintiff and her companions had a right to cross the street at the place in question, and they started across at a time when it seemed perfectly safe to do so. The jury found that plaintiff was not guilty of contributory negligence and we are in accord with that finding.

The sole other contention of defendant is that the court erred in giving what defendant calls plaintiff's given instructions Nos. 1, 2 and 5. The law relating to the giving of instructions, in force at the time of the trial, was as follows (Cahill's Ill. Rev. St. 1933, par. 195, ch. 110):

"The court shall give instructions to the jury only as to the law of the case. They shall be in writing, in the form of a continuous and connected narrative and not a series of separate instructions. To assist the court in fully and accurately instructing the jury as to the law, the parties may at any time submit to him suggestions orally or in writing, and before the case is argued to the jury, the parties shall be given an opportunity out of the presence of the jury to read the instructions which he proposes to give, and then to make other or further suggestions as to matters omitted. * * *" (*Italics ours.*)

There were no plaintiff's instructions nor defendant's instructions given. Each party suggested to the court principles of law to be given, but the court gave one written instruction. The record

that the "customers" sometimes gave tips to the boys when the latter drove the cars back. When Miss Scott, standing on the east curb, first saw the car coming it was about a half or two-thirds of a block away and Plaintiff and Miss Biscoe then had only ten feet to walk before they reached the west curb. Yet the automobile was upon Plaintiff when she had covered only four feet of that distance. According to Plaintiff's evidence this four-lane driveway was practically free from traffic at the time, and no person, however careful she might be, could anticipate that she would be run down in the westerly lane, a few feet from the curb, by a north-bound automobile. The conduct of Johnson in striking Plaintiff, when he had, according to Plaintiff's evidence, abundant space available to pass to the right of her, amounted to gross negligence. Plaintiff and her companions had a right to cross the street at the place in question, and they started across at a time when it seemed perfectly safe to do so. The jury found that Plaintiff was not guilty of contributory negligence and we are in accord with that finding.

The sole other contention of defendant is that the court erred in giving what defendant calls Plaintiff's given instructions Nos. 1, 2 and 3. The law relating to the giving of instructions, in force at the time of the trial, was as follows (Cecil, Ill. Rev. St. 1933, par. 155, ch. 110):

"The court shall give instructions to the jury only as to the law of the case. They shall be in writing, in the form of continuous and connected narrative and not a series of separate instructions. To enable the court to fully and accurately instruct the jury as to the law, the parties may at any time submit to him suggestions orally or in writing, and before the case is argued to the jury, the parties shall be given an opportunity out of the presence of the jury to read the instructions which he proposes to give, and then to make other or further suggestions as to matters omitted. * * * (Italics ours.)"

There were no Plaintiff's instructions nor defendant's instructions given. Each party suggested to the court principles of law to be given, but the court gave one written instruction. The record

shows that the court numbered the suggestions "for ready reference to indicate what portions, if any, might be objected to." Defendant objected to that part of the court's single instruction marked 1, "(1) because it failed to include the question of contributory negligence; (2) it failed to state the negligence as charged in the declaration; (3) it failed to state that it must be proved by preponderance of the evidence." The court's single instruction fully and fairly covered all of these principles of law. As to that part of the single instruction given that the court marked 2, it is somewhat difficult to understand the objections that were interposed to it by defendant. However, after a consideration of the part objected to we find nothing substantially wrong in it. That part of the single instruction marked 5 by the court reads as follows:

"5. In determining whether or not Joel Johnson was acting within the course of his employment by the defendant corporation in driving the said motor vehicle at the time of the acts complained of in the declaration in this case, you may also consider his acts and doings in the course of his employment before that time, the instructions given him by the manager of the defendant corporation, Johnson's daily conduct and the acts and doings he actually performed with the knowledge of his employer, and you may also consider in this same connection the duration of his employment."

We think that under the facts of this case the above part of the single instruction was proper.

The trial court seems to have tried the case ably and fairly. The verdict of the jury is a just one and the judgment of the Circuit court of Cook county is affirmed.

AFFIRMED.

Sullivan, P. J., and Friend, J., concur.

shows that the court considered the suggestion "for every reference to indicate that portions, if any, might be objected to." Defendant objected to that part of the court's single instruction marked 1. ("1) because it failed to include the question of contributory negligence; (2) it failed to state the negligence was charged in the declaration; (3) it failed to state that it must be proved by preponderance of the evidence." The court's single instruction fully and fairly covered all of these principles of law. As to that part of the single instruction given that the court marked 1, it is somewhat difficult to understand the objection that was interposed to it by defendant. However, after a consideration of the part objected to we find nothing substantially wrong in it. That part of the single instruction marked 1 by the court reads

as follows:

"8. In determining whether or not Joel Johnson was acting within the course of his employment by the defendant corporation in driving the said motor vehicle at the time of the acts complained of in the declaration in this case, you may also consider his acts and being in the course of his employment before and after the time the instructions given him by the manager of the defendant corporation, Johnson's daily conduct and the acts and things he actually performed with the knowledge of his employer, and you may also consider in this case connection the duration of his employment."

We think that under the facts of this case the above part of the single instruction was proper.

The trial court seems to have ruled the case right and

fairly. The verdict of the jury is a just one and the judgment of the circuit court of Cook county is affirmed.

WILLIAM J. ...

WILLIAM J. ... and ...

38792

MARY C. BRANDL,
Appellant,

v.

VILLAGE OF WINNETKA, a
Municipal Corporation,
Appellee.

48 7
APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

287 I.A. 622¹

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Mary C. Brandl filed her complaint against the Village of Winnetka, a municipal corporation, in which she prayed that an injunction issue restraining the Village from enforcing a certain zoning ordinance as amended against her property located in the Village. The Village filed a "motion for judgment" and also a "motion to dismiss," both of which motions were overruled. Defendant then pleaded to the merits, but in its answer renewed the objections which were the basis of the two motions that had been overruled. When the cause was called for trial the trial court, at defendant's request, allowed it to again argue the said objections and then ruled that plaintiff was not barred by certain former mandamus proceedings but that she had an adequate remedy at law and was therefore not entitled to equitable relief. After the complaint had been amended an order was entered that the former order overruling the motion for judgment and the motion to dismiss be vacated and that the said motions stand to the amended complaint as amended. The trial court then entered a decree overruling the motion to dismiss based upon the mandamus proceedings, but further ordering "that the motion of the defendant for

38792

MARY G. BRANDT,
Appellant,

v.

VILLAGE OF WINNETKA, a
Municipal Corporation,
Appellee.

APPEAL FROM DECISION OF THE

OF COOK COUNTY.

287 I.A. 622

MR. JUSTICE ROBERTSON DELIVERED THE OPINION OF THE COURT.

MARY G. BRANDT filed her complaint against the Village of Winnetka, a municipal corporation, in which she prayed that an injunction issue restraining the village from enforcing certain zoning ordinances as amended against her property located in the Village. The Village filed a "motion for judgment" and also a "motion to dismiss," both of which motions were overruled. Defendant then pleaded to the merits, but in its answer raised the objections which were the basis of the two motions that had been overruled. Then the cause was called for trial the trial court, at defendant's request, allowed it to again argue the merits objections and then ruled that plaintiff was not barred by certain former proceedings but that she had an adequate remedy at law and was therefore not entitled to equitable relief. The complaint has been amended in order to reflect that the former order overruling the motion for judgment and the motion to dismiss be vacated and that the said motion stand in the amended complaint as amended. The trial court then entered a decree overruling the motion to dismiss based upon the amended proceedings, but further ordering "that the motion of the defendant for

judgment on the ground that the facts stated in the amended complaint this day filed herein are insufficient to give this court equitable jurisdiction since it appears from the facts stated in such complaint that there is an adequate remedy at law for the alleged injuries set forth in the complaint as this day amended is hereby allowed and the plaintiff declining to plead further and electing to stand on her complaint as this day amended, the complaint as this day amended is accordingly hereby dismissed." Plaintiff then appealed to the Supreme court, whereupon defendant filed a motion in that court for an order transferring the cause to this court, and in support of the motion cited the final order of the trial court and contended that "the order appealed from is limited solely to the dismissal of the complaint in chancery on the ground that the facts stated in the complaint showed that the plaintiff has an adequate remedy at law," and that the trial court in passing upon the motion of defendant for judgment predicated his ruling solely upon the ground that plaintiff had an adequate remedy at law. The Supreme court thereupon found that the case was wrongfully appealed to that court and ordered it transferred to the Appellate court of the First District.

In this court defendant contends that "this appeal presents to the court solely a question of pleading - whether or not there is an adequate remedy at law for the injury alleged in the amended complaint. If this court considers the validity of the ordinance independently of these pleadings, it will be doing so as a matter of original jurisdiction;" that the trial court did not consider the question of the validity of the ordinance and that therefore this court is without jurisdiction to consider that question; that "the remedy by mandamus is a complete and adequate remedy at law for the injuries complained of by the plaintiff and therefore injunctive relief should be denied to the plaintiff;" that "the remedy

judgment on the ground that the facts stated in the amended complaint
this day filed herein are insufficient to give this court jurisdiction
jurisdiction since it appears from the facts stated in such complaint
that there is an adequate remedy at law for the alleged injuries and
therein is the complaint as this day amended is hereby allowed and the
plaintiff declining to plead further and electing to stand on her
complaint as this day amended, the complaint as this day amended is
accordingly hereby dismissed." Plaintiff then appealed to the supreme
court, whereupon defendant filed a motion in that court for an order
transferring the cause to this court, and in support of the motion
cited the final order of the trial court and contended that "the
order appealed from is limited solely to the dismissal of the complaint
in chambers on the ground that the facts stated in the complaint showed
that the plaintiff has an adequate remedy at law," and that the trial
court in passing upon the motion of defendant for judgment notwithstanding
his ruling solely upon the ground that plaintiff had an adequate remedy
at law. The supreme court thereupon found that the facts were such
fully appealed to that court and ordered it transferred to the appellate
court of the First District.

In this court defendant contends that "this appeal presents
to the court solely a question of pleading - whether or not there
is an adequate remedy at law for the injury alleged in the amended
complaint. If this court considers the validity of the ordinance
independently of these pleadings, it will be taking on the matter
of original jurisdiction; that the trial court did not consider
the question of the validity of the ordinance and that therefore
this court is without jurisdiction to consider that question; that
"the remedy by mandamus is a complete and adequate remedy at law
for the injuries complained of by the plaintiff and therefore the
negative relief should be denied to the plaintiff;" that "the remedy

of mandamus would give to the plaintiff what she requires."

The complaint alleges, in detail, that the amended ordinance as amended, in so far as it applies to the immediate surroundings in question, singles out plaintiff's property as one to be regulated by a different law than other properties in the immediate vicinity, but in view of defendant's position in this court it is not necessary for us to state in detail all of these allegations. From the complaint it appears that plaintiff owns certain property located on the corner of Scott and Linden avenues in the Village of Winnetka; that on August 30, 1934, she entered into an agreement with the Sinclair Refining Company, a corporation, whereby she agreed to sell and the Sinclair Refining Company agreed to buy part of her property, viz., the westerly 100 feet thereof, for \$20,000, the sale to be completed as soon as she should obtain an occupancy permit under the zoning ordinance or should otherwise secure the right to erect an automobile filling station thereon; that the Village refused to issue a building permit for the construction of a gasoline filling station or to issue its occupancy permit allowing the use of plaintiff's real estate for such purpose, on the sole ground that section 5 of the zoning ordinance of the Village forbids such use of the premises by reason of its location within 200 feet of buildings used or constructed for use for residence purposes; that the original zoning ordinance was adopted by the Village on January 17, 1922, and created five districts, which included all of the property in the Village; that on January 17, 1928, the Village adopted an amendment to the ordinance whereby automobile filling stations were allowed only in the "D" Industrial District; that on December 16, 1930, the Village adopted a further amendment to the ordinance whereby automobile filling stations were allowed in the "C" Commercial District, subject, however, to a proviso as follows:

"Provided, however, that no person, firm or corporation shall locate, build, construct or maintain an automobile filling

of mandamus would give to the plaintiff what she requests." The complaint alleges, in detail, that the amended ordinance is amended, in so far as it applies to the immediate surroundings in question, singles out plaintiff's property as one to be regulated by a different law than other properties in the immediate vicinity, but in view of defendant's position in this court it is not necessary for us to state in detail all of these allegations. From the complaint it appears that plaintiff owns certain property located on the corner of Scott and Linden avenues in the Village of Winnetka; that on August 30, 1934, she entered into an agreement with the Sinclair Refining Company, a corporation, whereby she agreed to sell and the Sinclair Refining Company agreed to buy part of her property, viz., the westerly 100 feet thereof, for \$20,000, the sale to be completed as soon as she should obtain an occupancy permit under the zoning ordinance or should otherwise secure the right to erect an automobile filling station thereon; that the Village refused to issue a building permit for the construction of a gasoline filling station or to issue the occupancy permit allowing the use of plaintiff's real estate for such purpose, on the sole ground that section 5 of the zoning ordinance of the Village forbids such use of the premises by reason of its location within 200 feet of buildings used or constructed for use for residence purposes; that the original zoning ordinance was adopted by the Village on January 17, 1923, and created five districts, which included all of the property in the Village; that on January 17, 1933, the Village adopted an amendment to the ordinance whereby automobile filling stations were allowed only in the "C" Commercial District; that on December 18, 1930, the Village adopted a further amendment to the ordinance whereby automobile filling stations were allowed in the "C" Commercial District, subject, however, to a provision as follows:

"Provided, however, that no person, firm or corporation shall locate, build, construct or maintain an automobile filling station within 200 feet of buildings used or constructed for use for residence purposes."

station, within two hundred feet of any building used as and for a hospital, church, library, community or parish house or public or private school or kindergarten and provided further that in measuring said minimum distance of two hundred feet such portion of said distance as lies within the boundaries of any public street shall be counted twice."

The complaint further alleges that on November 7, 1933, the Village adopted a further amendment to the ordinance which prohibits the location, building, construction or maintenance of automobile filling stations within 200 feet of any building used or constructed for use in whole or in part for residence purposes; that this amendment affects plaintiff's property. The complaint further alleges that if plaintiff's property can be used for an automobile filling station it is the most valuable piece of property in the Village for that purpose; that it is not at this time salable or usable for any of the other commercial purposes permitted in the "C" Commercial District nor will it become salable or usable for such purposes for a long time; that if her property cannot be used for the purposes of an automobile filling station it does not have any market value for any purpose and cannot be sold. The complaint further alleges that the restriction contained in section 5 of the zoning ordinance "has caused plaintiff great and irreparable injury by depriving her of the immediate sale of her property, constitutes a continuing cloud upon plaintiff's title to the premises owned by her and so long as such restriction remains in force she will be unable to sell or dispose of her property ^{and} will suffer irreparable injury unless the enforcement of said Section 5 of the Zoning Ordinance is restrained by this court."

The complaint prays, inter alia:

"(b) That the Village of Winnetka, a Municipal Corporation, its officers, agents, and employees may be perpetually restrained from enforcing said ordinance in so far as it prohibits the location, building, construction or maintenance of an automobile filling station upon the property above described by reason of its location within two hundred feet of any building used or constructed in whole or in part for residence purposes or from threatening to enforce such terms of said ordinance against such property.

station, within two hundred feet of any building used as and for a hospital, church, library, or school or any other place of public or private school or kindergarten and provided further that in measuring said minimum distance of two hundred feet such portion of said distance as lies within the boundaries of any public street shall be counted twice.

The complaint further alleges that on November 7, 1933, the Village

adopted a further amendment to the ordinance which prohibits the

location, building, construction or maintenance of automobile filling

stations within 200 feet of any building used or constructed for use

in whole or in part for residence purposes; that this amendment

affects plaintiff's property. The complaint further alleges that

if plaintiff's property can be used for an automobile filling station

is the most valuable piece of property in the Village for that pur-

pose; that it is not at this time valuable or usable for any of the

other commercial purposes permitted in the "C" Commercial District

nor will it become valuable or usable for such purposes for a long

time; that if her property cannot be used for the purposes of an

automobile filling station it does not have any market value for any

purpose and cannot be sold. The complaint further alleges that the

restriction contained in section 5 of the zoning ordinance "has a need

plaintiff great and irreparable injury by depriving her of the

immediate sale of her property, constitutes a continuing wrong upon

plaintiff's title to the premises owned by her and so long as such

restriction remains in force she will be unable to sell or dispose

of her property ^{and} will suffer irreparable injury unless the ordinance

of said section 5 of the zoning ordinance is restrained by this court."

The complaint prays, inter alia:

"(p) That the Village of Winnetka, a municipal corporation, its officers, agents, and employees may be perpetually restrained from enforcing said ordinance in so far as it prohibits the location, building, construction or maintenance of an automobile filling station upon the property above described by reason of its location within two hundred feet of any building used or constructed in whole or in part for residence purposes or from exercising its authority in such form of said ordinance against her property.

"(c) That the Village of Winnetka, a municipal corporation, its officers, agents, and employees may be perpetually restrained from interfering with the location, building, construction or maintenance of an automobile filling station upon the property above described by the plaintiff or by anyone claiming by, through or under her by reason of said property being located within 200 feet of any building used or constructed in whole or in part for residence purposes or from threatening any such interference.

"(d) That the plaintiff may have such other and further relief as the premises may require.

"That a writ of injunction may issue to restrain the Village of Winnetka, a Municipal Corporation, its officers, agents and employees from in any way interfering with the location, building, construction or maintenance of an automobile filling station upon the property mentioned in this complaint as amended by reason of the location of said property within two hundred feet of any building used or constructed in whole or in part for residence purposes."

Plaintiff contends that "1. The Court erred in sustaining the motion for judgment. 2. The Court erred in holding there was an adequate remedy at law. 3. The Court erred in holding that it was without equitable jurisdiction. 4. The Court erred in dismissing the complaint for want of equity."

The trial court and counsel for the Village have misconceived the purpose of the complaint. Plaintiff does not ask therein that the Village be ordered to give her a building permit. She wants no permit. She wishes to sell a part of her property to a purchaser who will pay \$20,000 for it if it can be used for filling station purposes and she asks the court to restrain the enforcement of the zoning ordinance as applied to her property, so that she may be enabled to sell the same. She alleges that her property is practically valueless at the present time for any other purpose; that the ordinance operates to destroy the value of her land and its marketability, and that the zoning ordinance is arbitrary, unreasonable and confiscatory as applied to her property. That such a complaint is maintainable in equity see Renschke v. Village of Winnetka, 363 Ill. 478, wherein it was held (p. 486):

"In determining whether the invasion of property rights under a purported police power, is unreasonable and confiscatory,

under a purported police power, is unreasonable and confiscatory, and determining whether the invasion of property rights

it was held (p. 286)

in County of Hennepin v. Village of Minneapolis, 100 Minn. 475, 115 N.W. 221.

and applied to her property. That such a regulation is unreasonable that the zoning ordinance is arbitrary, unreasonable and confiscatory operation to destroy the value of her land and its marketability, and less at the present time for any other purpose; that the ordinance to sell the same. The village that her property is peculiarly value-zoning ordinance is applied to her property, so that she may be excluded purposes and she asks the court to restrain the enforcement of the who will pay \$20,000 for it it can be used for filling station as permit. She wishes to sell a part of her property to a purchaser that the Village be ordered to give her a building permit. She wants caused the purpose of the complaint. Plaintiff does not ask the court The trial court and counsel for the Village have misconceived the complaint for want of equity."

was without equitable jurisdiction. 4. The Court erred in allowing an adequate remedy at law. 3. The Court erred in holding that it the motion for judgment. 2. The Court erred in holding there was Plaintiff contends that "1. The Court erred in sustaining

used or connected in whole or in part for business purposes." the location of said property within two hundred feet of any building the property mentioned in this complaint as owned by reason of construction or maintenance of an automobile filling station, building, employees from in any way interfering with the location, building, of Winnetka, a Municipal Corporation, its officers, agents and "That a writ of injunction may issue to restrain the Village of Winnetka, a Municipal Corporation, its officers, agents and

which as the premises may require. (b) That the plaintiff may have such other and further

purposes or from threatening any such interference. of any building used or connected in whole or in part for business or under her by reason of said property being located within 200 feet have been described by the plaintiff or by anyone claiming by, through maintenance of an automobile filling station upon the property from interfering with the location, building, construction or

its officers, agents, and any way or purposefully restrain the Village of Winnetka, a Municipal Corporation, its officers, agents, and

the extent to which property values are diminished by the provisions of a zoning ordinance must be given consideration. (State Bank and Trust Co. v. Village of Wilmette, supra [358 Ill. 311]; Forbes v. Hubbard, supra [348 Ill. 166].) The reasonableness of the ordinance is necessarily determined by the facts in the particular case. Tews v. Woolhiser, supra [352 Ill. 212]."

See also Ehrlich v. Village of Wilmette, 361 Ill. 213, wherein the court stated (p. 222):

"A court of equity will direct its restraining power against the enforcement of an ordinance, if ground exists therefor, to prevent irreparable injury. A zoning ordinance may be valid in its general aspects, and yet as to a particular state of facts involving a particular owner affected thereby be so clearly arbitrary and unreasonable as to confiscate his property and justify the intervention of a court of equity to restrain the enforcement of the ordinance. Village of Euclid v. Ambler Realty Co., 272 U. S. 365; St. Andrew Society v. Kansas City, 58 Fed. (2d) (U. S. Cir. Ct. of App. 593,) 599; Hectow v. City of Cambridge, 277 U. S. 183; Kennedy v. City of Evanston, 348 Ill. 426; Phipps v. City of Chicago, 339 id. 315; Western Theological Seminary v. City of Evanston, 325 id. 511."

We have not stated all of the allegations of the complaint for the reason that defendant, by its position, concedes that the complaint made out a prima facie case for equitable relief if it does not appear from the complaint that mandamus would give plaintiff all that she requires, and it is apparent from the complaint that mandamus would not afford plaintiff the relief she seeks.

The decree of the Superior court of Cook county is reversed and the cause is remanded with directions to the trial court to overrule defendant's motion for judgment on the ground that the facts stated were insufficient to give the court equitable jurisdiction, and for further proceedings not inconsistent with this opinion.

DECREE REVERSED AND CAUSE REMANDED WITH DIRECTIONS.

Sullivan, P. J., and Friend, J., concur.

the extent to which property values are diminished by the provisions of a zoning ordinance must be shown by evidence. (State Bank and Trust Co. v. City of Chicago, 1933 Ill. App. 3d 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000)

See also Wright v. Village of Chicago, 353 Ill. 218, wherein the court stated (p. 222):

"A court of equity will direct its reasoning from the enforcement of an ordinance, if found to be in violation of the vent inoperative injury. A zoning ordinance may be valid as to general aspects, and yet as to a particular case of facts involving a particular owner affected thereby be so clearly arbitrary and unreasonable as to constitute his property and thereby the basis of a court of equity to restrain the enforcement of the ordinance. Village of Chicago v. Chicago Realty Co., 353 Ill. 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000)

We have not stated all of the allegations of the complaint for the reason that defendant, by its position, concedes that the complaint sets out a prima facie case for equitable relief. It does not appear from the complaint that defendant would give relief till all that she requires, and it is apparent from the complaint that defendant would not allow plaintiff the relief she seeks. The decree of the superior court of Cook county is reversed and the cause is remanded with directions to the trial court to overrule defendant's motion for judgment on the ground that the facts stated were insufficient to give the court equitable jurisdiction, and for further proceedings not inconsistent with this opinion. Illinois, P. & M. and Chicago, P. & M. Co.

38861

OLGA SHOUKANOFF,
Appellant,

vs.

WILLIAM C. WALDBAUER et al.,
Appellees.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

287 I.A. 622²

MR. PRESIDING JUSTICE MATCHETT
DELIVERED THE OPINION OF THE COURT.

Plaintiff Shoukanoff is the owner of a principal note lettered "U" on which there is, as she claims, a balance unpaid of \$300, and another of the same series of notes lettered "LL" for \$100, and one lettered "SSS" for \$500. These were part of a series of 97 notes issued by John A. Westland and Ellen Westland on April 10, 1928, in the aggregate amount of \$35,000, to secure the payment of which the makers on the same day conveyed certain premises in Cook county, Illinois, to the Chicago Title and Trust Company as trustee. After the execution of the trust deed and about October 27, 1928, the Westlands conveyed the premises to Dimiter G. Ducoff and Kallopia Ducoff, subject, however, to the lien of the trust deed.

July 19, 1932, default having been made in the payment of these notes, plaintiff, in behalf of herself and all who were holders of these notes so secured, filed a bill to foreclose. The bill was duly verified, made the Westlands and the Ducoffs, the trustee, and unknown owners of the notes, parties defendant. The bill alleged that the premises, which are located at 5700 North Maplewood avenue, Chicago, and improved by an eight flat, two story building, were scant security for the debt; that the makers of the notes were insolvent, and prayed for the appointment of a receiver to collect the rents pending the suit and for foreclosure.

On the motion of solicitors for the complainant, the court on July 29, 1932, appointed Theodore C. Nemoyer receiver. The

38881

WILLIAM C. WILDMAN et al.,
Appellees.

vs.

WILLIAM C. WILDMAN et al.,
Appellees.

387 I.A. 622

MR. PRESIDING JUDGE WILDMAN
DELIVERED THE OPINION OF THE COURT.

Plaintiff Greenblatt is the owner of a principal note
 lettered "U" on which there is, as the alias, a balance unpaid of
 \$300, and another of the same series of notes lettered "M" for
 \$100, and one lettered "W" for \$200. These were part of a
 series of 97 notes issued by John A. Westman and John Westman
 on April 10, 1932, in the aggregate amount of \$38,000, to secure
 the payment of which the makers on the same day conveyed certain
 premises in Cook county, Illinois, to the Chicago Title and Trust
 Company as trustee. After the execution of the trust deed and
 about October 27, 1932, the Westmans conveyed the premises to
 Daniel G. Decort and William Decort, subject, however, to the
 lien of the trust deed.

July 19, 1932, default having been made in the payment of
 these notes, plaintiff, in behalf of himself and all who were
 holders of these notes so secured, filed a bill to foreclose.
 The bill was duly verified, and the Westmans and the Decorts,
 the trustees, and unknown owners of the notes, parties defendant.
 The bill alleged that the premises, which are located at 2700
 North Maplewood avenue, Chicago, and improved by an eight flat,
 two story building, were sent security for the debt; that the
 makers of the notes were insolvent, and prayed for the appointment
 of a receiver to collect the rents pending the suit and for other
 closure.

On the motion of defendant for the appointment, the court
 on July 29, 1932, appointed Theodore G. Sawyer receiver. The

receiver, however, failed to qualify by giving bond as required, and Ducoff, in the meantime, collected the rentals from the property.

August 8, 1933, William C. Waldbauer et al., owners of similar notes, secured an order from the court giving them leave to intervene, and August 15, 1933, filed their answer to the bill, in which, while admitting the execution of the notes and trust deed, etc., they denied that plaintiff was the owner of the notes, denied that there was a balance due thereon as alleged, and denied that the same were a valid lien against the premises under the terms of the trust deed. On the contrary they averred that Ducoff, owner of the equity, in fact owned these notes, and that the notes were paid and delivered up to the owners after the maturity of same, and that plaintiff was merely the nominal holder of them; they prayed that the bill of complaint might be dismissed.

September 11, 1933, defendants Waldbauer et al., filed a cross bill alleging the same facts ^{to} as the alleged ownership of the notes by plaintiff. They asserted that plaintiff purchased the notes from Andreas Schultheis before the filing of her bill, and that the bill to foreclose was not filed in good faith but in collusion and fraud with the Ducoff's for the purpose of controlling the foreclosure proceedings, and to prevent the true owners of the notes from protecting their interests, and to compel them to accept an inequitable plan of reorganization of the property.

They averred that they were the owners of more than 50% of the entire issue of the notes, set up the material facts as to the execution of the notes and trust deed, the ownership thereof, the conveyance of the premises, and defaults of those obligated to pay, and prayed that the trust deed might be foreclosed.

Plaintiff answered the cross bill, denying its allegations as to non-ownership, payment, etc., of the notes held by her, and

nevertheless, however, failed to qualify by filing bond as required, and Dooft, in the meantime, collected the rentals from the property.

August 1, 1933, William C. Waldman et al., owners of similar notes, secured an order from the court giving them leave to intervene, and August 13, 1933, filed their answer to the bill, in which, while admitting the execution of the notes and trust deed, etc., they denied that plaintiff was the owner of the notes, and denied that there was a balance due thereon as alleged, and denied that the same were a valid lien against the premises under the terms of the trust deed. On the contrary they averred that plaintiff, in fact owned these notes, and that the notes were paid and delivered up to the owners after the maturity of same, and that plaintiff was merely the nominal holder of them; they prayed that the bill of complaint might be dismissed.

September 11, 1933, defendants Waldman et al., filed a cross bill alleging the same facts as the alleged ownership of the notes by plaintiff. They asserted that plaintiff purchased the notes from various individuals before the filing of her bill, and that the bill to foreclose was not filed in good faith but in collusion and fraud with the Dooft for the purpose of controlling the foreclosure proceedings, and to prevent the true owners of the notes from protecting their interests, and to compel them to accept an inequitable plan of reorganization of the property. They averred that they were the owners of said notes and the entire issue of the notes, set up the material facts as to the execution of the notes and trust deed, the ownership thereof, the conveyance of the premises, and delivery of same obligated to pay, and prayed that the trust deed should be foreclosed. Plaintiff answered the cross bill, denying its allegations as to non-ownership, payment, etc., of the notes sold to her, and

denied the alleged collusion with the owners of the equity. The cause was put at issue and referred to a master, who filed his report finding in favor of cross complainants, recommending a decree of foreclosure in their favor and that the original bill be dismissed. The cause was heard by the chancellor upon exceptions of plaintiff to the report of the master. These exceptions were overruled and a decree entered in favor of the cross complainants on July 25, 1935. It finds a total of \$36,958.70 to be due to thirty-five different owners of the notes and directs the sale of the premises. To reverse that decree the plaintiff has perfected this appeal. The decree finds that Dimiter Ducoff and complainant were guilty of collusion; directed that the indebtedness represented by the notes held by plaintiff should be cancelled as a lien against the property and enjoined the plaintiff or any persons acquiring the notes thereafter from bringing proceedings to establish any such lien thereunder. The decree further provided that the order "shall in no way preclude Olga Shoukanoff or any other persons from enforcing the collection against the makers." The decree ordered that the bill of complaint be dismissed for want of equity, and that Ducoff (who is now dead) should account for the sum of \$1808.12, which was the amount of the rentals from the premises collected by him as a result of the failure of the receiver to qualify.

Plaintiff contends that the court erred in sustaining the findings of fact set forth by the master, and also erred in entering a decree as recommended by him cancelling the lien of the three notes held by the plaintiff, while at the same time providing that the notes themselves should not be cancelled, but that the owners might proceed against the makers thereof. Complainant contends that regardless of how the notes were acquired, she was entitled to maintain a representative suit to foreclose on behalf of all the note holders, and that it was improper for the court to permit a cross

denied the alleged collusion with the owners of the equity. The
cause was put at issue and referred to a master, who filed his re-
port finding in favor of cross complainants, recommending a decree
of foreclosure in their favor and that the original will be dis-
missed. The cause was heard by the chancellor upon exceptions of
plaintiff to the report of the master. These exceptions were over-
ruled and a decree entered in favor of the cross complainants on
July 28, 1935. It finds a total of \$56,908.70 to be due to thirty-
five different owners of the notes and directs the sale of the
premises. To reverse that decree the plaintiff has perfected this
appeal. The decree finds that District Court and complainant were
guilty of collusion; directs that the indebtedness represented by
the notes held by plaintiff should be cancelled as a lien against
the property and enjoins the plaintiff or any persons acquiring
the notes thereafter from bringing proceedings to establish any such
lien thereunder. The decree further provides that the order "shall
in no way prejudice Olga Bookbinder or any other persons from enforce-
ing the collection against the maker." The decree orders that the
bill of complaint be dismissed for want of equity, and that Bookbinder
(who is now dead) should account for the sum of \$108.12, which
was the amount of the rebate from the interest collected by him
as a result of the failure of the receiver to qualify.
Plaintiff contends that the court erred in sustaining the
findings of fact set forth by the master, and also erred in enter-
ing a decree as recommended by him cancelling the lien of the three
notes held by the plaintiff, while at the same time providing that
the notes themselves should not be cancelled, and that the owners
might proceed against the maker thereof. Complainant contends that
revelation of how the notes were acquired, was not entitled to main-
tain a representative suit to foreclose on behalf of all the note
holders, and that it was improper for the court to grant a decree

bill to be filed and to allow solicitors' fees and expenses to cross complainants. These fees and expenses, it is alleged, should have been allowed to the plaintiff.

We have examined the evidence and find that it supports the findings of the master and of the decree and justifies the conclusion of the chancellor that the suit by complainant to foreclose (ostensibly brought in the interest of and for the benefit of all the holders of the notes) was in fact brought in collusion with and for the benefit of the owners of the equity. This conclusion is compelled by uncontradicted evidence, which shows the close friendship between the Shoukanoffs and the Ducoffs; the promise of the husband of complainant, John K. Shoukanoff, to help out the Ducoffs; his purchase of the notes in the name of his wife when the same were past due and without investigation of the worth of the security; his personal employment of a lawyer to act in her behalf in the foreclosure proceedings; the fact that the attorney thereafter acted in the interest of the Ducoffs as against the owners of the notes, in that he secured an order appointing a receiver, who did not qualify, and who has not since been found, thus deceiving the owners of the notes and permitting the Ducoffs to retain control of the mortgaged premises from August 1, 1933, to October 1, 1933, during which time they collected rents to the amount of \$1808.12, which, if the matter had been properly pressed, would have been collected for the benefit of the owners of the notes. The plan of reorganization of the property prepared by this attorney was decidedly favorable to the owners of the equity. All this with the absence of material exhibits from the record makes it quite impossible for us to hold that the findings of the decree are in this respect contrary to the weight of the evidence. On the contrary, we hold the evidence justifies the finding of the decree that the suit was collusive. A court of equity will not

bill to be filed and to allow collection, fees and expenses to cross complainants. These fees and expenses, it is alleged, should have been allowed to the Plaintiff.

We have examined the evidence and find that it supports the findings of the master and of the decree and justifies the conclusion of the Chancellor that the suit by complainant to foreclose (ostensibly brought in the interest of and for the benefit of all the holders of the notes) was in fact brought in collusion with and for the benefit of the owners of the equity. This conclusion is compelled by uncontroverted evidence, which shows the close friendship between the Shonkenells and the Dacolls; the promise of the husband of complainant, John K. Shonkenell, to help out the Dacolls; his purchase of the notes in the name of his wife when the same were put out and without investigation of the worth of the security; his personal employment of a lawyer to act in her behalf in the for foreclosure proceedings; the fact that the attorney thereafter acted in the interest of the Dacolls as against the owners of the notes, in that he secured an order appointing a receiver, who did not qualify, and who has not since been found, thus depriving the owners of the notes and permitting the Dacolls to retain control of the mortgaged premises from August 1, 1933, to October 1, 1933, during which time they collected rents to the amount of \$303.12, which, if the matter had been properly pressed, would have been collected for the benefit of the owners of the notes. The plan of reorganization of the property prepared by this attorney was decidedly favorable to the owners of the equity.

All this with the chance of material exhibits from the record makes it quite impossible for us to hold the findings of the decree are in this respect contrary to the weight of the evidence. On the contrary, we hold the evidence justifies the finding of the decree that the suit was collusive. A court of equity will not

permit such abuse of its process. He who comes into equity must come with clean hands. He who is guilty of iniquity with respect to the very matter concerning which he prays relief will not be allowed to prevail. In Pomeroy's Equity Jurisprudence, 3rd ed., vol. 1, sec. 397, page 657, comparing the maxim that "He who comes into equity must come with clean hands" with the other maxim that "He who seeks equity must do equity" says:

"On the other hand, the maxim now under consideration, 'He who comes into equity must come with clean hands,' is much more efficient and restrictive in its operation. It assumes that the suitor asking the aid of a court of equity has himself been guilty of conduct in violation of the fundamental conceptions of equity jurisprudence, and therefore refuses him all recognition and relief with reference to the subject-matter or transaction in question. It says that whenever a party who, as actor, seeks to set the judicial machinery in motion and obtain some remedy, has violated conscience, or good faith, or other equitable principle, in his prior conduct, then the doors of the court will be shut against him in limine; the court will refuse to interfere on his behalf, to acknowledge his right, or to award him any remedy."

The decree therefore, insofar as it dismissed the complainant's bill, was proper and will be affirmed.

But a different principle, we think, controls as to the relief granted to the complainants on their cross bill. These complainants were asking equitable relief and to them the maxim that "he who seeks equity must do equity" was applicable. The decree we think went too far in adjudging the cancellation of the complainant's lien under the trust deed as the owner of the three notes in question, and enjoining her further resort to the courts to seek her rights thereunder, except by way of a suit at law against the makers of the notes. The uncontradicted evidence showed complainant was the owner of the three notes described in her bill; that the same were due and unpaid; and that they were secured by the trust deed upon which the cross-bill was presented. She is equitably entitled to receive her share of the proceeds of the sale under the foreclosure decree.

It was error to remit her to a suit at law against the

perpetrator such as of the process. He who comes into equity must come with clean hands. He who is guilty of immorality with respect to the very matter concerning which he prays relief will not be allowed to prevail. In *Lomen v. Society Insurance, Ltd.*, etc., Vol. 1, sec. 397, page 507, concerning the maxim that "no one comes into equity must come with clean hands" and the other maxim that "He who seeks equity must do equity" says:

"On the other hand, the maxim now under consideration, 'He who comes into equity must come with clean hands', is much more strictly and restrictively in its operation. It requires that the petitioner, in the aid of a court of equity, has himself been guilty of conduct in violation of the fundamental conceptions of equity justice, and therefore refuses him all recognition and relief. It says reference to the subject-matter or transaction in question. It says that whenever a party who, as equity, seems to need the judicial machinery in action and obtain some remedy, has violated conscience, or good faith, or other equitable principle, in his prior conduct, then the doors of the court will be shut against him. If the court will refuse to interfere on his behalf, so as to award him right, or to award him any remedy."

The decree therefore, that the maxim as it is stated in the Plaintiff's Bill, was proper and will be affirmed.

But a different principle, to which, contrary to the law that is granted to the complainant on their own Bill. There were complaints were being equitable relief and to them the court that "he who seeks equity must do equity" was applicable. The decree we think went too far in requiring the complainant to do so. And a lien under the trust deed as the owner of the three notes in question, and enjoining her further resort to the courts to seek her rights thereunder, except by way of a bill at law against the owners of the notes. The unaccounted evidence showed defendant was the owner of the three notes not as described in the bill; that the same were the said notes; and that they are secured by the same deed upon which the cross-bills were presented. And in equity, entitled to receive her share of the proceeds of the sale of the three notes.

elsewhere decrees.

It was error to require her to do so as the court has

makers, who, the evidence shows, are no longer owners of the premises and whom it may be most unjust to compel to make payment of these notes. The master should therefore have found that complainant, as cross defendant, was the owner of the three notes; further, the amount due to her thereon with interest; that she was entitled to have the same satisfied pro tanto out of the proceeds of the sale. He should have included the amount due to her with that of other owners of the notes. For this error the decree will be reversed and the cause remanded to the trial court with directions that the chancellor cause such computation of the amount due to cross defendants on these notes be made, and the amount so found be included in the decree with directions that the owner be allowed to participate equitably in the proceeds of the sale.

AFFIRMED IN PART, REVERSED IN PART
AND REMANDED WITH DIRECTIONS.

O'Connor and McSurely, JJ., concur.

...who, the value of which, and the nature of the present-
 see and whom it may be most useful to consult in the present
 these notes. The matter would be better served by having some explanation
 and, as cross references, and the nature of the present matter; further,
 the amount due to her father's interest; and the same would be
 to have the same referred to in the present of the
 also. He should have limited the number of his references to
 other owners of the notes. For this reason the notes will be re-
 versed and the same referred to the present of the present
 that the same have been each of the present of the present
 given reference on the present of the present, and the same will be
 included in the present of the present of the present of the present
 to participate completely in the present of the present.

APPROVED IN WITNESS WHEREOF, I have hereunto set my hand and the seal of the said
 AND REMAINED THE PUBLIC SEAL.

O'Connor and Kearney, J.J., counsel.

38986

ADVANCE HEATING COMPANY,
a Corporation,

Appellant,

vs.

CATHOLIC BISHOP OF CHICAGO,
Appellee.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

287 I.A. 622³

MR. PRESIDING JUSTICE MATCHETT
DELIVERED THE OPINION OF THE COURT.

December 17, 1930, the defendant (a corporation sole) entered into a contract with complainant, a contractor, whereby it was agreed that plaintiff should furnish material and labor to install a heating plant on defendant's premises at 4846 West Montana street, Chicago. Specifications prepared by defendant's architect, James Burns & Company, were made a part of the contract. In January, 1931, plaintiff began work under the agreement, and completed the work and furnished materials as called for by the contract, plus extras amounting to \$845. The original contract called for the payment of \$3550. Assuming that the work has been properly completed in compliance with the terms of the contract, there is a balance unpaid to the amount of \$495.

Plaintiff brought suit for this claimed balance in the Municipal court of Chicago, which was afterward, while this present suit was pending in the Circuit court, dismissed by stipulation of the parties. The present bill was filed May 4, 1933, to establish a lien against the premises for the alleged balance with interest from May 4, 1931. Defendant answered setting up certain defenses. The cause was referred to a master, who took the testimony and filed his report, recommending that the bill be dismissed for want of equity. The cause was heard on exceptions to the report, which were overruled, and on May 5, 1936, a decree was entered dismissing the bill.

The controversy between the parties concerns a "Morrissey"

ADVANCE HEATING COMPANY,
a Corporation,
Appellant,
vs.
CATHOLIC BISHOP OF CHICAGO,
Appellee.

287 I.A. 623

DECEMBER 17, 1930, THE DEFENDANT (A CORPORATION) ENTERED INTO A CONTRACT WITH COMPLAINANT, A CONTRACTOR, WHEREBY IT WAS AGREED THAT COMPLAINANT SHOULD FURNISH MATERIAL AND LABOR TO INSTALL A HEATING PLANT ON DEFENDANT'S PREMISES AT 4325 WEST LONTANA STREET, CHICAGO. SPECIFICATIONS PREPARED BY DEFENDANT'S ARCHITECT, JAMES H. HARRIS & COMPANY, WERE MADE A PART OF THE CONTRACT. IN JANUARY, 1931, COMPLAINANT BEGAN WORK UNDER THE AGREEMENT, AND COMPLETED THE WORK AND FURNISHED MATERIALS AS OBLIGED BY THE CONTRACT, PLUS EXTRA AMOUNTING TO \$245. THE ORIGINAL CONTRACT CALLED FOR THE PAYMENT OF \$3850. ASSUMING THAT THE WORK HAD BEEN PROPERLY COMPLETED IN COMPLIANCE WITH THE TERMS OF THE CONTRACT, THERE IS A BALANCE DUE TO THE DEFENDANT OF \$425.

COMPLAINANT BROUGHT SUIT FOR THIS ALLEGED BALANCE IN THE CIRCUIT COURT OF CHICAGO, WHICH WAS DEFERRED, WHILE THIS PRESENT SUIT WAS PENDING IN THE CIRCUIT COURT, BECAUSE OF A VIOLATION OF THE PARTIES. THE PRESENT SUIT WAS FILED MAY 4, 1931, IN WHICH A LIEN AGAINST THE PREMISES FOR THE ALLEGED BALANCE WITH INTEREST FROM MAY 4, 1931. DEFENDANT ANSWERED SETTING UP CERTAIN DEFENSES. THE CAUSE WAS REFERRED TO A MASTER, WHO TOOK THE EVIDENCE AND FILED HIS REPORT, RECOMMENDING THAT THE BILL BE DISMISSED FOR WANT OF EQUITY. THE CAUSE WAS TAKEN ON EXCEPTIONS TO THE REPORT, WHICH WERE OVERTURD, AND ON MAY 3, 1932, A DECREE WAS ENTERED DISMISSING THE BILL.

THE CONTROVERSY BETWEEN THE PARTIES CONCERNING A "LIEN" IN THE BILL.

oil burner, called for by the specifications and installed by the manufacturers under a subcontract with complainant. May 8, 1931, an explosion occurred on the premises, which caused clouds of smoke laden soot to penetrate the entire building, ruining the furnishings, paintings, etc., and causing damages to an amount of \$575, for which defendant seeks to recoup in this litigation, on the theory that the burner furnished was defective and complainant negligent in the operation of it.

One of the defenses interposed by defendant is that plaintiff's claim was released by an accord and satisfaction. As already stated, at the time of the filing of the bill in this case a suit, brought by plaintiff against defendant based upon the same claim, was pending in the Municipal court of Chicago. May 9, 1933, this suit at law was dismissed by stipulation of the attorneys for the respective parties. The stipulation did not mention the suit pending in the Circuit court, which had been filed, but service of summons had not been obtained, although there is evidence tending to show that defendant's attorney was aware that the suit was pending at the time the stipulation was entered into. Evidence was offered in behalf of defendant tending to show that the attorney for defendant understood that the claims of both parties were to be dropped; but there was no proof of any valid agreement to that effect, nor proof of authority given to its attorney by complainant to make any such settlement. The master found against the contention, the chancellor approved, and we cannot say that the finding of the master in this respect is against the evidence.

The complainant, on March 9, 1931, executed a waiver of lien, and defendant argues that complainant is thereby estopped from now claiming a lien. Such, undoubtedly, would be the effect of the waiver as to work done and material furnished prior to the date upon which the lien was executed and delivered. The master,

oil burner, called for by the specifications and installed by the manufacturer under a subcontract with complaint. May 8, 1931, an explosion occurred on the premises, which caused clouds of smoke later sent to penetrate the entire building, ruining the furnishings, paintings, etc., and causing damages to an amount of \$375, for which defendant seeks to recover in this litigation, on the theory that the burner furnished was defective and complaint negligent in the operation of it.

One of the defenses interposed by defendant is that plaintiff's claim was released by an accord and satisfaction. As already stated, at the time of the filing of the bill in this case a suit, brought by plaintiff against defendant based upon the same claim, was pending in the Municipal Court of Chicago. May 8, 1931, this suit at law was dismissed by stipulation of the attorneys for the respective parties. The stipulation did not mention the suit pending in the Circuit Court, which had been filed, but service of summons had not been obtained, although there is evidence tending to show that defendant's attorney was aware that the suit was pending at the time the stipulation was entered into. Evidence was offered in behalf of defendant tending to show that the attorney for defendant understood that the claims of both parties were to be dropped; but there was no proof of any valid agreement to that effect, nor proof of authority given to its attorney by complaint to make any such settlement. The master found against the defendant, the Chancellor approved, and we cannot say that the finding of the master in this respect is against the evidence.

The complaint, on March 9, 1931, executed a waiver of lien, and defendant agrees that complaint is thereby released from now claiming a lien. But, undoubtedly, would be the effect of the waiver as to work done and material furnished prior to the date upon which the lien was executed and delivered. The master,

however, finds and the proof tends to show that after that time complainant furnished equipment and labor to the total amount of \$471.65. Complainant is therefore not precluded by the waiver.

No claim for lien was filed in the office of the clerk of the Circuit court, and no sworn statement as to subcontractor's material, men, etc., as provided for in sections 5 and 7 of the Lien Act. (See Illinois State Bar Stats., 1935, chapter 82, sections 5 and 7, and the same sections in chapter 82 of Smith-Hurd's Illinois Statutes.) Defendant argues that complainant's suit can not be maintained for failure to comply with these sections of the statute, and cites Gilmore v. Courtney, 158 Ill. 432; Weiska v. Imroth, 43 Ill. App. 357; Hart v. Carsley Mfg. Co., 221 Ill. 444; Knickerbocker v. Halsey Bros. Co., 262 Ill. 241. The Gillmore case and the Weiska case were both decided under the Lien Statute of 1887, and were based upon a provision in that statute which does not appear in the present statute. Hall v. Harris, 242 Ill. App. 315. The other cases cited are not in point. Complainant is not precluded from maintaining its suit for these reasons.

Defendant also contends that plaintiff cannot maintain the suit because there was no final certificate from the architect, and cites Michaelis vs. Wolf, 136 Ill. 68. This point was not raised in the trial court. The defense was not set up in defendant's pleading and it cannot avail here, when presented in this court for the first time.

This appeal, therefore, seems to turn upon the issue of fact, as to whether the finding of the master, as approved by the chancellor, that defendant was liable for the damages resulting from the explosion which occurred May 8, 1931, should be permitted to stand. There is no doubt, as complainant points out, citing many cases, that the burden was upon the defendant to establish his

many cases, that the burden was upon the defendant to establish his
to stand. There is no duty, no obligation not to act, arising
from the explosion which occurred May 6, 1931, would be permitted
chancellor, that defendant was liable for the damages resulting
fact, as to whether the finding of the master, as approved by the
This appeal, therefore, comes to turn upon the issue of
first time.

ing and it cannot avail here, when presented in this court for the
the trial court. The answer can not set up the defendant's plea-
tices Michaelis v. Wolf, 136 Ill. 51. This point was not raised in
suit because there was no trial certificate from the circuit court, and
Defendant also contends that liability cannot exist in the
excluded from maintaining its suit for these reasons.

315. The other cases cited are not in point. Complaint is not
not appear in the present statute. Hall v. Harris, 245 Ill. 400.
1887, and were based upon a provision in the statute which does
and the Weiss case were both decided under the then statute of
Kolkerbocker v. Halsey Bros. Co., 282 Ill. 241. The Gilmore case
In Smith v. Halsey Bros. Co., 281 Ill. 444;
statute, and other Gilmore v. Halsey Bros. Co., 281 Ill. 432;
not be maintained for failure to comply with these sections of the
Illinois Statutes. Defendant argues that complaint is not ten-
tions 5 and 7, and the same sections in chapter 32 of Illinois Stat-
utes 5 and 7, as provided for in sections 5 and 7 of the
material, men, etc., as provided for in sections 5 and 7 of the
the circuit court, and no sworn statement as to subcontractor's
no claim for loss was filed in the office of the clerk of
\$471.63. Complaint is therefore not prescribed by the waiver.
complaint furnished equipment and labor to the total amount of
however, finds and the circuit court to make its own finding.

claim of recoupment by a preponderance of the evidence, nor is there any doubt, as complainant points out, that the report of a master (where, as here, no evidence was taken before the chancellor) is only advisory to the chancellor, and while prima facie correct is not entitled in this court to the same weight as the verdict of a jury or the finding of a chancellor where the evidence has been taken in open court. It is so held in Mallinger vs. Shapiro, 329 Ill. 629, and Stasch v. Stasch, 355 Ill. 581.

The contract between the complainant and defendant provided that defendant agreed -

"To furnish and install a complete Low-Pressure steam heating apparatus in a convent building to be erected for St. Gertrude's Parish, located 4846 W. Montana St., Chicago, Illinois, according to the plans, specifications and drawings (which are declared to be a part of this agreement), made by James Burns & Co., Architect (acting as agent for said owner), in a good and substantial and workmanlike manner, to the satisfaction of and under the direction of the Superintendent."

The specifications thus made a part of the contract provide that:

"Contractor must guarantee the perfect operation of this plant in every detail; that it will be noiseless in operation. Contractor shall also guarantee that he will make good any defects in workmanship, material or effectiveness of plant within one year after completion of same without cost to owner."

Specification as to the oil burner was that the contractor should "furnish and install one 'Morrissey' #6 Fuel Oil Burner, mercoid thermostat, making job completely automatic in operation, burner to be of sufficient size to operate #8295 Pacific oil burning boiler, full-rated capacity *** boiler to be set by others, as oil burner contractor may specify."

The installation of the heating system was begun in January, 1931, and the master finds that it was finished on May 9, 1931. The contract for putting in the oil burner was sublet by plaintiff to the Morrissey Oil Burner Company, which installed it. Frank Lessnau, an employee of the Morrissey Company, made the installation. Mr.

claim of recognition by a predecessor of the evidence, but in
there any doubt, as a complement of the out, that the report of
master (where, as here, no evidence was taken before the com-
cellor) in any advisory, in the counsel, and while the
correct in not entitled in this court to the same weight as the
verdict of a jury or the finding of a court where the evidence
has been taken in open court. It is so held in Whitney v.

Whitney, 320 Ill. 23, and Steele v. Steele, 320 Ill. 231.

The contract between the complainant and defendant provided
that defendant agreed -

"To furnish and install a complete low-pressure steam heating ap-
paratus in a convent building to be erected on St. Gertrude's
Parish, located 4346 W. Central St., Chicago, Illinois, according
to the plans, specifications and drawings (which are attached to
be a part of this agreement), made by James H. Jones & Co., architect
(acting as agent for said owner), in a good and substantial and work-
manlike manner, to the satisfaction of, and under the direction of,
the Superintendent."

The specifications thus made a part of the contract pro-
vide that:

"Contractor must guarantee the perfect operation of this plant in
every detail; that it will be noiseless in operation. Contractor
shall also guarantee that he will make good any defects in the
masonry, material or effectiveness of plant within one year after
completion of same without cost to owner."

Specification as to the oil burner was that the contractor

should "furnish and install one 'Morrisey' oil burner,
mercoide thermostat, making job completely automatic in operation,
burner to be of sufficient size to operate 15000 Btu oil burning
boiler, full-rated capacity *** boiler to be not by others, as oil
burner contractor may specify."

The installation of the heating system was begun in January,
1931, and the master finds that it was finished on May 2, 1931. The
contract for putting in the oil burner was made by plaintiff to
the Morrisey Oil Burner Company, which installed it. Frank Morrison,
an employee of the Morrisey company, made the installation. It

McLean was superintendent of the job for the contractor, and the Burns Company, architect, representing the defendant owner, were in charge for him. The burner was put in sometime in February. Immediately thereafter defendant made complaints about the operation of the system, and to Lessnau seems to have been committed the duty of making any necessary adjustments in conformity with the contract.

The master finds that the nozzle of the oil burner was removed and a larger nozzle installed in order to supply more oil for fuel when all the radiators had been connected; that after the installation of the larger nozzle there was an accumulation of carbon and soot in the oil burner which interfered with the proper mixture of air with the oil, thereby preventing the complete combustion of burning of the oil supplied by the larger nozzle as fuel; that as a result the explosion occurred on May 8, 1931, blowing greasy soot through the building, injuring the paint, curtains and the inside of the building. The master further finds that on the day of the explosion the representatives of the complainant and Lessnau, the employee of the Morrissey Oil Burner company, examined the building and the extent of the damage; that Lessnau removed the nozzle supplying the oil for the burner, stating, "Here is where the trouble is;" that he replaced the nozzle, since which time no trouble has occurred in operating the heating plant.

The conclusion of the master was that the damage to defendant's building was "occasioned by the defective operation of said oil burner," for which the complainant is liable.

The plain terms of the contract with the facts as recited would seem to justify the conclusion of the master. Plaintiff nevertheless contends that it cannot be held liable for the reason that the "Morrissey" Oil Burner was purchased by defendant under a trade-name, and plaintiff relies upon section 15, paragraph 4, of

Johnson was superintendent of the job for the contractor, and the Burns Company, architect, representing the defendant, were in charge for him. The burner was put in operation in January. Immediately thereafter defendant made complaints about the operation of the system, and to defendant seems to have been omitted the duty of making any necessary adjustments in conformity with the contract.

The master finds that the nozzle of the oil burner was removed and a larger nozzle installed in order to save oil. After oil for fuel when all the radiators had been connected; and after the installation of the larger nozzle there was an accumulation of carbon and soot in the oil burner which interfered with the proper mixture of air with the oil, thereby preventing the complete combustion of burning of the oil supplied by the larger nozzle as fuel; that as a result the explosion occurred on May 6, 1921, flowing greasy soot through the building, injuring the paint, curtains and the inside of the building. The master further finds that on the day of the explosion the radiators at the complaint were closed, the employee of the Burns Oil Burner Company, named as the building and the extent of the damage; that defendant removed the nozzle supplying the oil for the burner, stating, "that is where the trouble is;" that he reloaded the nozzle, since which time no trouble has occurred in operating the heating plant.

The conclusion of the master was that the damage to defendant's building was "occasioned by the defective operation of said oil burner," for which the complaint is liable. The plain terms of the contract with the facts as recited would seem to justify the conclusion of the master. Plaintiff nevertheless contends that it cannot be held liable for the reason that the "Lorisy" oil burner was purchased by defendant under a trade-name, and plaintiff relied upon section 15, paragraph 4, of

the Uniform Sales Act (Illinois State Bar Stats., 1935, page 2807; Smith-Hurd Illinois Stats., chap. 121, section 15), which provides:

"In case of a contract to sell or a sale of a specified article under its patent or other trade name, there is no implied warranty as to its fitness for any particular purpose."

Complainant cites a large number of cases in the Supreme and Appellate courts of this state, such as Fuch v. Kittredge & Co., 242 Ill. 88; Santa Rosa---Vallejo Tan. Co. v. Kronauer & Co., 228 Ill. App. 236, and Neigenfind v. Singer, 227 Ill. App. 493, construing that paragraph of this section of the statute. We hold that neither the statute nor any of the cases cited are applicable where, as here, the contract between the parties provides not only for the sale of the article but its installation in a manner satisfactory to the purchaser, and promises to make good any defects within one year after completion, without cost to the owner. Not the statute but the contract is here controlling.

The findings of the master seem to have been based upon the testimony of the assistant pastor of the church and the architect, Walter J. Burns, as to conversations with Frank Lessnau, the employee of the Morrissey Oil Burner Company, on the day on which the explosion occurred. The complainant objected to the evidence at the time it was offered and contends here that it was error to admit it for the reason that the conversation took place out of the presence of any representative of the complainant, the Advance Heating Company. Defendant cites in support of this contention eight cases, all of which we have examined. These cases, under the various circumstances appearing in each of them, hold that a party is not bound by statements of a third party, who is not his agent, unless the party sought to be bound or some person authorized to represent him is present. Defendant's counterclaim here does not rest merely upon oral statements made by Lessnau but rather upon

the United States (Illinois State Bar Assn., 1935, 230 Ill. 230);
Smith v. Illinois State Bar Assn., 1935, 230 Ill. 230, which provides:
"In case of a contract to sell or a sale of a specified article
under its patent or other trade name, there is no implied war-
rantee as to its fitness for any particular purpose."
Counsel also cites a large number of cases in the Illinois
and appellate courts of this state, such as Smith v. Illinois
Co., 242 Ill. 88; Smith v. Valley, 242 Ill. 88; Smith v. Valley, 242 Ill. 88;
238 Ill. App. 236, and Reid v. Smith, 237 Ill. App. 103,
constituting that paragraph of this section of the statute. We hold
that neither the statute nor any of the cases cited are applicable
where, as here, the contract between the parties provides not only
for the sale of the article but its installation in a manner
warranty to the purchaser, and provides to make good any de-
fects within one year after completion, without cost to the seller.
Not the statute but the contract is here controlling.
The findings of the master are to have been based upon the
testimony of the plaintiff's expert, the expert and the witness,
Walter J. Burns, as to conversations with Frank Messner, the em-
ployee of the company, on the day on which
the explosion occurred. The complaint of the plaintiff to the variance
at the time it was offered and concluded that it was error to
admit it for the reason that the conversation took place out of
the presence of any representative of the defendant, the advance
Hasting Company. Defendant offers in support of this contention
eight cases, all of which we have examined. These cases, under
the various circumstances appearing in each of them, hold that a
party is not bound by statements of a third party, who is not his
agent, unless the party sought to be bound of some person authorized
to represent him is present. Defendant's contention here does not
rest merely upon oral statements made by Messner but rather upon

testimony showing what Lessnau, an employee of the subcontractor actually did in the course of his duties under the terms of the contract between complainant and defendant. It is not contended that the testimony as to what Lessnau did was incompetent, and we are quite at a loss to understand why testimony as to the acts being competent, evidence as to what he said while acting was incompetent. The subcontractor was certainly the agent of the contractor in the installation of the oil burner. His employee, with the consent and acquiescence of all the parties in charge of the improvement being made, acted for the plaintiff in carrying out the terms of the contract. It would seem on the plainest principles that what he said and did within the scope of his duties was admissible in evidence. While the amount here involved is comparatively small, the record and briefs are voluminous, and every possible contention seems to be presented by the parties. We have given these contentions careful consideration, but the issue seems to narrow down to a question of fact as to whether the complainant carried out the terms of the contract as agreed, and if not, whether it is liable for the damage resulting from defects in the heating plant which was installed. We think complainant ^{so} is/liable. The master has so found; the chancellor has approved the finding; and an examination of the evidence leads this court to the same conclusion. The decree of the trial court is therefore affirmed.

AFFIRMED.

O'Connor and McSurely, JJ., concur.

testimony showing what reason, an employee of the subcontractor actually did in the course of his duties under the terms of the contract between complainant and defendant. It is not contended that the testimony as to what reason did was inconsistent, and we are quite at a loss to understand why testimony as to the facts being competent, evidence as to what he said while acting was incompetent. The subcontractor was certainly the agent of the contractor in the installation of the old burner. His employee, with the consent and acquiescence of all the parties in charge of the improvement being made, acted for the plaintiff in carrying out the terms of the contract. It would seem on the plaintiff's principles that what he said and did within the scope of his duties was admissible in evidence. While the record here involved is comparatively small, the record and trials are voluminous, and every possible contention seems to be presented by the parties. We have given these contentions careful consideration, but the issue seems to narrow down to a question of fact as to whether the complainant carried out the terms of the contract as agreed, and if not, whether it is liable for the losses resulting from defects in the heating plant which was installed. We think complainant ^{is} liable. The master was so found; the commissioner approved the finding; and an examination of the evidence leads this court to the same conclusion. The decree of the trial court is therefore affirmed.

Admitted.

39020

PETER A. MEYER,
Appellant,

vs.

SAMUEL A. COHN,
Appellee.

5 / 17
APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

287 I.A. 622⁴

MR. PRESIDING JUSTICE MATCHETT
DELIVERED THE OPINION OF THE COURT.

Meyer brought an action against Cohn for damages for failure to buy certain real estate as agreed. The declaration set up the alleged contract verbatim, which was in writing, alleged ability and willingness on the part of plaintiff and refusal to perform by defendant. The common counts were added. Defendant filed the general issue with certain special pleas. The cause was submitted to a jury. At the close of all the evidence the defendant moved for an instructed verdict in his favor. The court, in conformity with section 68 of the Civil Practice Act, reserved its ruling and submitted the cause to the jury, which returned a verdict for plaintiff in the sum of \$23,000. Defendant first moved for a new trial, then withdrew that motion in order to move for a judgment in his favor notwithstanding the verdict. The court allowed the motion and entered judgment against plaintiff and in favor of defendant, and plaintiff appeals.

The alleged contract was executed May 11, 1926. The real estate in question was Nos. 4900-02-04-06 West Chicago avenue, was in fact the northwest corner of West Chicago avenue and Lamon street. The premises were improved by one-story buildings designed for business use, were owned by Meyer and in part occupied by Tony Lombardo, who carried on a fruit business. Meyer became the owner of this property on March 19, 1926. A man named Gorad ran a drug store just across the street from the premises. A new theater

SAMUEL A. COHN, Appellee.
 vs.
 JAMES A. MEYER, Appellant.

APPEAL FROM CIRCUIT COURT
 OF COOK COUNTY.

287 I.A. 622

R. FRANKLIN JUDICIAL SALARY
 DELIVERED THE OFFICE OF THE CLERK.

Meyer brought an action against Cohn for damages for failure to pay certain real estate taxes. The decision set up the alleged contract verbalized, which was in writing, alleged ability and willingness on the part of plaintiff and refusal to perform by defendant. The common counts were added. Defendant filed the general issue with certain special pleas. The cause was submitted to a jury. At the close of all the evidence the defendant moved for an instructed verdict in his favor. The court, in conformity with section 64 of the Civil Practice Act, reserved its ruling and submitted the cause to the jury, which returned a verdict for plaintiff in the sum of \$25,000. Defendant first moved for a new trial, then withdrew that motion in order to move for a judgment in his favor notwithstanding the verdict. The court allowed the motion and entered judgment against plaintiff and in favor of defendant, and granted costs. The alleged contract was executed July 11, 1936. The real estate in question was No. 4300-02-0-00 West Chicago Avenue, was in fact the northwest corner of West Chicago Avenue and Leamon Street. The premises were improved by one-story buildings designed for business use, were owned by Meyer and in part occupied by Tony Lombardo, who carried on a lunch business. Meyer became the owner of this property on March 12, 1936. A new paved front yard was laid out across the street from the premises. A new theater

building was about to be erected on Chicago avenue in this immediate neighborhood, which some supposed would add to the value of real estate in that vicinity. An old building stood on the site of the proposed theater. A permit for wrecking this building was issued May 12, 1926. A contract for the erection of the new building was executed July 14, 1926. Work was started July 30th thereafter and continued until October 21st, when it was temporarily stopped to be begun again June 30, 1927, and completed in August of that year.

Meyer, the plaintiff owner, lived in Elmhurst. He had not prior to this transaction known the defendant, who lived at 750 Kennesaw terrace, Chicago, and was an investor in stocks, bonds and mortgages. He ^{often} seems to have been at the office of Charles Sincere and Company in Chicago. Defendant for about fifteen years had been acquainted with H. L. Siegel, who conducted an automobile business at 3806 Roosevelt road, Chicago. Siegel says, and defendant does not deny, that sometime in April, 1926, he and Siegel met at West Baden, when defendant asked him about the new theater to be erected and asked him if he knew of some property out of which he could make some money. Siegel owned a piece of ground just 125 feet west of these premises owned by Meyer. In fact Siegel at one time rented part of the premises from Meyer for use in the automobile business. Siegel also knew William J. Klibanow, who had for many years been in the real estate business and who, at this time, had a partner named Stein. Klibanow was a licensed broker and operated two real estate offices in Chicago. Klibanow says Siegel introduced him to Cohn at West Baden, but Cohn says he does not recall the introduction. Klibanow says that at West Baden he talked with defendant about property in Chicago and told him that he would

building was about to be erected on Chicago Avenue in this immediate neighborhood, which some witnesses would say to the value of \$100,000. An old building stood on the site of the proposed theater. A permit for widening this building was issued May 12, 1926. A contract for the erection of the new building was executed July 14, 1926. Work was started July 20th thereafter and continued until October 1927, when it was temporarily stopped to be begun again June 2, 1927, and completed in August of that year.

Mayor, the plaintiff herein, lived in Chicago. He was not prior to this transaction from the defendant, who lived at 750 Tennessee Terrace, Chicago, and was an investor in stocks, bonds and mortgages. He said to have been at the office of Charles Binow and company in Chicago. Defendant for about fifteen years had been acquainted with J. J. Binow, who had been an automobile business at 3000 North La Salle, Chicago. Binow says, and defendant does not deny, that sometime in April, 1926, he and Binow met at West Baden, when defendant asked him about the new theater to be erected and asked him if he knew of some property out of which he could raise some money. Binow owned a piece of ground just 125 feet west of these premises owned by Mayor. He told Binow at one time rented part of the premises from Mayor for use in the automobile business. Binow also knew William J. Ribnow, who had for many years been in the real estate business and who, at this time, had a partner named Stein. Ribnow was a licensed broker and operated the real estate offices in Chicago. Ribnow says Binow introduced him to Stein at West Baden, but Stein says he does not recall the introduction. Ribnow says that at West Baden he talked with defendant about property in Chicago and told him that he would

be glad to submit some properties for his consideration. Later Klibanow by appointment met defendant at the office of Charles Sincere and Company. Mr. Siegel came with him and Klibanow says defendant was driven to the property and went through it for the purpose of examination. Siegel says that when he came back to Chicago Klibanow brought defendant to his store, and that defendant then said he was buying this property and would like to have Siegel go with him to look at it; that he, Klibanow and defendant then drove to it by automobile and from there to plaintiff's house at Elmhurst about 4 o'clock p. m. of the day the contract was made. It appears that on their way to the property these parties visited a tavern where they had beer; that upon arrival at Elmhurst they were taken to plaintiff's cellar where they sampled some four or five casks of wine, and that afterward plaintiff's daughter served further liquid refreshments. It is agreed that they talked about the price; that defendant offered \$80,000 for the property. Plaintiff wanted more. Plaintiff's brokers, however, took him aside and persuaded him, as he says, to accept \$83,000.

Defendant says that Klibanow, Siegel and Stein came over to the office of Charles Sincere and Company, where defendant was on May 11th, in the forenoon; that he told them that if they would wait until two o'clock he would go with them to look at the building. They came that afternoon in an automobile and drove first to the Independent Realty Company office. Klibanow told defendant that the premises were occupied in part by Lombardo, who did not have a lease but was paying \$400 a month rent; that Mr. Gorad had agreed to take a 25 foot corner and pay a rental therefor of \$250 a month; for a term of five years; that Lombardo was willing to take a 20 foot store at the west end of the building and to pay \$1500 a year for five years; that he figured that when remodeled at a cost of \$5200 the building would bring a gross revenue of \$9000

be glad to submit some properties for his consideration. Later Kibnow by appointment met defendant at the office of Charles Sincere and Company. Mr. Siegel came with him and Kibnow says defendant was driven to the property and went through it for the purpose of examination. Siegel says that when he came back to Chicago Kibnow brought defendant to his store, and that defendant and then said he was buying this property and would like to have Siegel go with him to look at it; that he, Kibnow and defendant then drove to it by automobile and from there to plaintiff's house at Elmhurst about 4 o'clock p. m. of the day the contract was made. It appears that on their way to the property these parties visited a tavern where they had beer; that upon arrival at Elmhurst they were taken to plaintiff's cellar where they sampled some beer or five cases of wine, and that afterward plaintiff's daughter served further liquid refreshments. It is agreed that they talked about the price; that defendant offered \$25,000 for the property. Plaintiff wanted more. Plaintiff's broker, however, took him aside and persuaded him, as he says, to accept \$25,000.

Defendant says that Kibnow, Siegel and Stein went over to the office of Charles Sincere and Company, where defendant was on duty, in the forenoon; that he told them that if they would wait until two o'clock he would go with them to look at the building. They came that afternoon in an automobile and drove first to the Independent Realty Company office. Kibnow told defendant that the premises were occupied in part by lumbermen, who did not have a lease but was paying \$400 a month rent; that Mr. Gort had agreed to lease a 25 foot corner and pay a rental therefor of \$250 a month for a term of five years; that lumbermen was willing to take a 20 foot store at the west end of the building and to pay \$1500 a year for five years; that he figured that when remodelled at a cost of \$250 the building would bring a gross revenue of \$9000

a year. He says they drove to the building but did not go in, and that from the building they were driven to Meyer's home in Elmhurst as heretofore recited. When the price was finally settled, defendant asked about the tax bills and was told they were in a safety deposit vault. He asked about special assessments and was told there were none. He asked about the leases from Lombardo and Gorad and was given the same assurance and ^{told} that he should not worry. Klibanow asked him for a check for \$5000 to close the deal, and defendant told him he would see about it the following day. Klibanow then called him aside and told him in a confidential way that there were many people interested in the property and he had better make the deal "right here." Defendant told him he did not have anyone to represent him, and that he wouldn't give him \$5000. Klibanow replied,

"I will tell you what you do. Give me a check for \$1,000. We will use that as a binder, and tomorrow morning you bring me the additional \$4,000. I will have here the tax bills; I will have the receipts; I will show you the leaseholds; I will show you everything to that."

Defendant says he agreed; that Klibanow took the contract from his pocket, sat down at the desk, filled in the paper, and that that plaintiff then signed it and tendered it to defendant, who also signed. He then asked Klibanow if he had a blank check. Klibanow said he did not. Plaintiff then tendered him one of his checks, so he wrote out a check for \$1000 and handed both the paper and the check to Klibanow. Defendant says that the contract was not in the same condition then as it was when offered in evidence; that he understood he was merely signing what he calls a "binder." He says he was to receive a written contract the next day, when he was to bring in an additional \$4000. Klibanow then drove defendant home.

The following morning, with Mr. Durell and Mr. Barney Lewin, defendant visited the building which he was to purchase, saw Lombardo

and Gorad, each of whom told him that the representations made by plaintiff's agents to him concerning their leases were untrue. Defendant then called up the bank and stopped payment on the check he had given them. Then he called plaintiff and asked him to come and see him, and plaintiff came a few days later. Defendant testifies that Meyer said to him at that time,

"'Why did you stop payment on that check?' I said to him, 'That is the reason I asked you to come over here, Mr. Meyer.' I said to him, 'Mr. Meyer, I can't understand the reason why you have tried to put through a crooked deal of that kind.' He says to me, 'What do you mean?' I said, 'Exactly what I mean. The deal is crooked, and you know that the deal is crooked. You were present right there when Mr. Klibanow told me that Mr. Gorad had agreed to take space in that store and pay a rental of \$250 a month and you said nothing, and you were present when Klibanow told me that Mr. Lombardo had agreed to take twenty feet of space in that store and pay a rental of \$125 a month and you said nothing. You heard all these things that Mr. Klibanow told me.' 'Well,' he said, 'I didn't tell you that, did I?' I says, 'No, but your agent told me that.' He said, 'I am not responsible for what real estate agents tell you.' I got so hot under the collar that I felt I could not control myself and I just walked out of that room."

Defendant denied that he spoke to plaintiff about the matter after the 12th day of May, and denies the testimony of plaintiff that several days thereafter defendant told plaintiff he hadn't decided whether he wanted the property, and that he hadn't called the deal off yet, or words to that effect. Defendant denied that he ever saw Klibanow, Siegel and Meyer together at his office after May 12th, or had the conversation to which they testified. He admitted, however, he could not recall whether he had testified on another trial that Klibanow came to see him a number of days after he stopped payment on the check, and Henner, a witness called by defendant, says that he saw plaintiff at Sincere's office a number of times after that date, and also the court reporter who took the evidence in a former trial of another case based on the check testified that defendant was asked how many times in all he had seen Klibanow and replied that Klibanow came

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over a number of times after he stopped payment on the check.

Plaintiff and Klibanow in rebuttal gave evidence denying defendant's testimony as to statements made concerning the leases to Lombardo and Gorad.

Defendant contends that his motion for judgment notwithstanding the verdict was justified because there was no evidence tending to show that plaintiff was ready and willing to perform his part of the agreement to convey, because he did not offer an abstract of title, a guaranty policy, a Torrens certificate, or a warranty deed as required by the contract, all of which it is said were conditions precedent to sustaining this action. He cites a large number of cases which are not applicable because the uncontradicted evidence shows (assuming a valid contract) that defendant first breached it by stopping payment on his check, thus repudiating and disavowing the contract. Where one party to a contract has thus breached and repudiated (as defendant's own testimony here shows he did), the other party is not obligated to perform his obligations under the contract before bringing his suit for damages. As is stated in Lang v. Hedenburg, 277 Ill. 368, "If a contract calls for successive acts, first by one party and then by the other, there is no breach by one if the precedent act has not been performed by the other." When defendant stopped payment on the check he unequivocally repudiated the contract.

Defendant also contends that the judgment notwithstanding the verdict was proper because plaintiff failed to prove his title to the premises in question. There was proof tending to show possession under claim of title. There was no proof to the contrary. Defendant did not base his refusal to carry out the contract upon any supposed deficiency or defect in plaintiff's title. He made no objection to the title and cannot be heard to urge that objection now. Ashbaugh v. Murphy, 90 Ill. 182; Smith v. Keeler, 161 Ill.

over a number of times after he stopped payment on the check.
 Plaintiff and Alibonow in repeated gave evidence denying
 defendant's testimony as to statements made concerning the loans
 to Lombardo and Gorda.

Defendant contends that his action for judgment notwithstanding the verdict was justified because there was no evidence tending to show that plaintiff was ready and willing to perform his part of the agreement to convey, because in his not only an absence of title, a guaranty policy, a Torrens certificate, or a warranty deed as required by the contract, all of which he is said were conditions precedent to making this action. He offers a large number of cases which are not applicable because the undisputed evidence shows (assuming a valid contract) that defendant first breached it by stopping payment on his check, thus repudiating and disavowing the contract. Where one party to a contract has thus breached and repudiated (as defendant's own testimony here shows he did), the other party is not obligated to perform his obligations under the contract before bringing suit for damages. As is stated in Bank v. Hedberg, 207 Ill. 385, "If a contract calls for successive acts, first by one party and then by the other, there is no breach by one if the subsequent act has not been performed by the other." When taken in its proper context, the check he unconditionally repudiated the contract.

Defendant also contends that the judgment notwithstanding the verdict was proper because plaintiff failed to prove his title to the premises in question. There was proof tending to show possession under claim of title. There was no need to the contrary. Defendant did not base his refusal to carry out the contract upon any supposed defect in or defect in plaintiff's title. He made no objection to the title and cannot be heard to urge that objection now. Arbuckle v. Murphy, 20 Ill. 182; Smith v. Smith, 111 Ill.

518; Spengler v. Eiger, 255 Ill. App. 322. Moreover, when plaintiff offered to prove his title by a warranty deed duly acknowledged and recorded, conveying the premises to him, defendant objected and the court (erroneously) sustained the objection. Defendant is now estopped to assert any lack of proof in that respect. Bigelow on Estoppel, 5th ed., page 720; Modern Woodmen of America v. Anderson, 71 Ill. App. 351; Thompson v. McKay, 41 Cal. 221.

A more serious question is raised by defendant's contention that plaintiff failed to prove by competent evidence that he sustained substantial damages by reason of defendant's alleged breach of contract. Plaintiff undertook to prove his damages by the testimony of Klibanow. The full record of the testimony of Klibanow material to this point is as follows:

"Mr. Kahn (attorney for plaintiff): Mr. Klibanow, based upon your experience and knowledge of real estate transactions in that vicinity, that immediate vicinity, and your knowledge of the conditions that existed, have you an opinion as to the value of the property known as 4900-02-04-06 West Chicago avenue in the latter part of June, 1936?

Mr. Tannebaum (attorney for defendant): I object to the question, it is too indefinite, the witness is not competent.

The Court: You mean the fair cash market value?

Mr. Kahn: Yes; I meant the fair cash market value of a front foot or any way you know how to figure it, particularly on the property in 1926.

The Court: Objection overruled.

Mr. Kahn: Have you an opinion?

A. Yes, sir.

Q. What is your opinion?

Mr. Tannebaum: I object to that.

The Court: Objection overruled.

A. I was offered, the best offer--

Mr. Kahn: Not what you were offered.

A. The property has depreciated.

Mr. Kahn: That may go out. You are not answering my question. The question is, what your opinion was of the value of this particular property, 4900-06 West Chicago avenue in the latter part of June, 1926.

A. \$50,000.

Mr. Tannebaum: I move the answer be stricken out, your Honor.

The Court: Objection overruled."

This is the only evidence in the record tending to show the amount of plaintiff's damages.

Defendant contends that it is in several respects insuffi-

518; Spencer v. Loper, 228 Ill. App. 3d, 302. Moreover, when plain-

tiff offered to prove his title by a warranty deed duly acknowledged

and recorded, conveying the premises to him, defendant objected

and the court (erroneously) sustained the objection. Defendant is

now estopped to assert any lack of record in this respect. Illinois

on Estoppel, 5th ed., page 720; Illinois on Estoppel, 5th ed.,

Anderson, 71 Ill. App. 3d, 301; Illinois v. Illinois, 41 Ill. App.

A more serious question is raised by defendant's contention

that plaintiff failed to prove by competent evidence that he was

tained substantial damages by reason of defendant's alleged wrong

of contract. Plaintiff undertook to prove his loss by the

testimony of William. The full record of the testimony of William

shows material to this point is as follows:

"William (attorney for plaintiff): I, William, based
upon your experience and knowledge of real estate values in
that vicinity, that in the vicinity, and your knowledge of the
conditions that existed, have you an opinion as to the value of the
property known as 4800-02-04-05 West Chicago Avenue in the latter
part of June, 1936?"

William (attorney for defendant): I object to the
question, it is too indefinite, the answer is not competent.

The Court: You mean the fair market value?

William: Yes; I remember this case and its value of
rental for or any way you know how to figure it, particularly on
the property in 1936.

The Court: Objection overruled.

William: Have you an opinion?

A. Yes, sir.

Q. What is your opinion?

William: I object to that.

The Court: Objection overruled.

A. I was offered, the case offered.

William: But what you were offered.

A. The property was offered.

William: That was not. I do not remember.

William: The question is, what your opinion was at the value of
this particular property, 4800-02-04-05 West Chicago Avenue in the latter
part of June, 1936.

A. \$60,000.

William: I gave the answer as witness out, your

Honor.

The Court: Objection overruled."

This is the only evidence in the record tending to show the amount

of plaintiff's damages.

Defendant contends that it is in several respects insuffi-

cient. First, in that the question asked called for the past rather than the present opinion of the expert witness as to the value of the property. Second, that it was indefinite in that it called only for the value of the property without limitation as to the fair cash market value thereof. As to the first objection, defendant cites Lyons v. Chicago City Ry. Co., 258 Ill. 75. It seems to sustain his contention. As to the second, Dickson v. Turner, 149 Ill. App. 394, and Dady v. Condit, 209 Ill. 488, which also seem to be in point. We think, also the evidence was incompetent for the reason that it purported to fix the value of the land at an indefinite time in June instead of fixing it as of the 12th day of May, 1926, at which time the breach of the contract (assuming such breach as the jury found) actually occurred. The cases last cited hold that the true measure of damages in an action for failure to convey real estate as agreed is the difference between the fair cash market value of the land and the contract price on the day upon which the contract was breached. There is no testimony in this record which can fairly be said to establish the fair cash market value of these premises on the 12th day of May, 1926, when the defendant repudiated the contract, stopping payment on his check and charging that the contract had been obtained from him by false representations.

We may add that while on the issue of fraudulent representations there was undoubtedly a question of fact for the jury, an examination of the evidence has convinced us (notwithstanding some inaccuracies in defendant's evidence) that these representations were made; that defendant relied upon them, and that the verdict of the jury upon this issue was against the manifest weight of the evidence. It is unreasonable to suppose that defendant would have executed the contract under the circumstances here shown unless, induced by representations such as he relates and high pressure salesmanship which the evidence shows was applied. It is hardly

client. First, in that the question asked called for the best rather than the present opinion of the expert witness as to the value of the property. Second, that it was indefinite in that it called only for the value of the property without limitation as to the fair cash market value thereof. As to the first objection, Wetzel v. City of Chicago, 358 Ill. 73, 12 N.E.2d 606, 100 Ill. App. 3d 4, and Gay v. Condit, 353 Ill. 420, which also were cited in this connection. As to the second, Wetzel v. City of Chicago, 358 Ill. 73, 12 N.E.2d 606, 100 Ill. App. 3d 4, and Gay v. Condit, 353 Ill. 420, which also were cited in this connection. We think, also the value was indicated for the reason that it purported to fix the value of the land as an interest in time in June instead of fixing it as of the 15th day of May, 1932, at which time the breach of the contract (assuming such breach as the jury found) actually occurred. The agent first offered land as the true measure of damages in an action for failure to convey real estate as agreed in the difference between the fair cash market value of the land and the contract price on the day upon which the contract was breached. There is no testimony in this record which can fairly be said to establish the fair cash market value of the premises on the 15th day of May, 1932, when the defendant repudiated the contract, stopping payment on his check and charging that the contract had been obtained from him by false representations. We may add that while on the issue of fraudulent representations there was undoubtedly a question of fact for the jury, an examination of the evidence has convinced us (notwithstanding some inaccuracies in defendant's evidence) that these representations were made; that defendant relied upon them, and that the verdict of the jury upon this issue was against the defendant and in favor of the plaintiff. It is unnecessary to suppose that defendant would have executed the contract under the circumstances now known unless induced by representations such as he relates and high pressure salesmanship which the evidence does not show. It is further

credible that the cash value of these premises fell 25 per cent in a few days, as plaintiff's evidence tends to show.

The judgment is affirmed.

AFFIRMED.

O'Connor and McSurely, JJ., concur.

credible that the case value of these premises is \$25 per acre in

a few days, as plaintiff's evidence tends to show.

The judgment is affirmed.

ATTEST.

O'Connor and McGuire, J.J., circuit.

39108

RICHARD L. WHITTON,
Appellee,

vs.

OUTDOOR ADVERTISING AGENCY
OF AMERICA, Inc.,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

287 I.A. 623¹

MR. PRESIDING JUSTICE MATCHETT
DELIVERED THE OPINION OF THE COURT.

In an action on contract for commissions claimed to be due, and upon trial by jury there was a verdict in favor of plaintiff for the whole amount claimed, namely, \$2353.53, upon which the court, overruling motions of the defendant for a new trial, and for judgment, notwithstanding the verdict entered judgment which defendant asks us to reverse, contending first that the judgment should be reversed without remanding, but in any case reversed and remanded because it is manifestly against the evidence, because the court erred in its rulings upon the admission and exclusion of evidence and in giving and refusing instructions.

Defendant corporation is an advertising agency engaged in procuring outdoor advertising accounts from national advertisers and carrying the same into execution through artists, lithographers and others for "plant owners," that is persons who own and operate poster display and paint display structures and locations upon which may be appropriately erected and maintained electric advertising displays. Defendant maintains an office in Chicago, New York and other large cities in the United States. L. P. Scoville, Jr., is president, Porter F. Leach, Vice president, in charge of the Chicago office; John Lutzen, service manager and assistant secretary; R. T. M. McCready, general counsel and organizer, and one of its directors; E. W. Stevens, sales manager of the Chicago branch of the business; Raymond B. Lawrence, secretary and treasurer.

RICHARD L. WHITTON,
Appellee,

vs.

OUTDOOR ADVERTISING AGENCY
OF AMERICA, Inc.,
Appellant.MR. PRESIDING JUSTICE LATCHETT
DELIVERED THE OPINION OF THE COURT.

In an action on contract for commissions claimed to be due, and upon trial by jury there was a verdict in favor of plaintiff for the whole amount claimed, namely, \$2533.65, upon which the court, overruling motions of the defendant for a new trial, and for judgment, notwithstanding the verdict entered judgment which defendant asks us to reverse, conceding first that the judgment should be reversed without remanding, but in any case reversed and remanded because it is manifestly against the evidence, because the court erred in its rulings upon the admission and exclusion of evidence and in living and retaining instructions.

Defendant corporation is an advertising agency engaged in procuring outdoor advertising accounts from national advertisers and carrying the same into execution through artists, lithographers and others for "plant owners," that is persons who own and operate poster display and paint display structures and locations upon which may be appropriately erected and maintained electric advertising displays. Defendant maintains an office in Chicago, New York and other large cities in the United States. J. P. Devallie, Jr., is president, Porter A. Reed, vice president, in charge of the Chicago office; John Luten, service manager and assistant secretary; R. T. M. McCreedy, general counsel and organizer, and one of its directors; J. W. Stevens, sales manager of the Chicago branch of the business; Raymond L. Lawrence, secretary and treasurer.

In the spring of 1932 plaintiff, through Mr. Leach of the Chicago office, entered into an oral agreement with defendant by the terms of which it was agreed that he should accept employment by defendant, according to the version of plaintiff, as a "salesman or solicitor," but according to defendant as an "account executive." The business of defendant was conducted upon such a basis that it was supposed to receive in full compensation for its services as intermediary between the advertisers and the "plant owners" 16-2/3% of the total charge for such advertising. The salesman, solicitor or "account executive," whose principal duty it was in the first instance to secure the account of the advertiser, received a commission of 7 1/2% of the total amount received by the defendant from the customer in full compensation for his services. Defendant in March, 1932, employed plaintiff upon that basis to perform such services. As already stated, the agreement was oral and it would appear did not cover all possible contingencies. It is agreed that plaintiff was to pay his own travelling and hotel expenses; that the contract was not for any fixed period and was not to be determined at any particular agreed time. Compensation was to be computed entirely upon the basis of such customers as should be secured for defendant by plaintiff. Plaintiff entered upon his employment and continued in that relationship to defendant up to about March 25, 1935. On that date he wrote John Lutzen that he would send in no more orders under the former arrangement; that he had consummated a new arrangement for handling his business, and that future commitments would go through this channel. The letter explains that the reasons for changing his relationship were wholly financial; he asks Mr. Lutzen to thank the officials of the company for their uniform courtesy and requests that if new business should come into the office in connection with painted displays for Detroit or Houston that Lutzen would see that it got into the hands

In the spring of 1932 plaintiff, through Mr. Leach of the Chicago office, entered into an oral agreement with defendant the terms of which it was agreed that he should accept employment by defendant, according to the version of plaintiff, as a "salesman or solicitor," but according to defendant as an "account executive." The business of defendant was conducted upon such a basis that it was supposed to receive in full compensation for its services as intermediary between the advertiser and the "plant owners" 16-2/3% of the total charge for such advertising. The salesman, solicitor or "account executive," whose principal duty it was in the first instance to secure the account of the advertiser, received a commission of 1/2% of the total amount received by the defendant from the customer in full compensation for his services. Defendant in March, 1932, employed plaintiff upon that basis to perform such services. As already stated, the agreement was oral and it would appear did not cover all possible contingencies. It is agreed that plaintiff was to pay his own travelling and hotel expenses; that the contract was not for any fixed period and was not to be determined at any particular agreed time. No commission was to be computed entirely upon the basis of such customers as should be secured for defendant by plaintiff. Plaintiff entered upon his employment and continued in that relationship to defendant up to about March 25, 1935. On that date he wrote John Bateman that he would send in no more orders under the former arrangement; that he had consulted a new arrangement for handling his business, and that future commissions would go through this channel. The latter explains that the reasons for changing his relationship were wholly financial; he asks Mr. Bateman to break the officials of the company for their uniform courtesy and requests that it now be made known to come into the office in connection with related displays for Bateman or Houston that Bateman would see that it got into the hands

of Mr. Thomas Scrutchin of 624 S. Michigan avenue, Chicago. The evidence shows that a few days prior to this time plaintiff entered into a copartnership with Scrutchin by which they agreed to carry on an advertising business as copartners.

The controversy between plaintiff and defendant concerns accounts which he obtained for defendant prior to that time. Plaintiff procured for defendant two orders for poster advertising from the Paige Motor Company, one for \$11,941.10 and another for \$14,682.72. Plaintiff also obtained from the Brown-Williamson Tobacco Company on May 21, 1934, an order for an advertisement through an electric spectacular display to be made in the city of New York. The advertisement was to continue for a period of three years beginning August 1, 1934. For the first twenty months the Tobacco company was to pay \$2400 a month and for the remaining months of the contract \$1725 a month. The Motor company during April and May paid to defendant on account of these contracts obtained by plaintiff \$26,623.80. Plaintiff claims a commission on account thereof amounting to \$1996.79. From April to September, 1935, the Tobacco company paid to defendant on account of the contract obtained for defendant by plaintiff \$14,400, on which plaintiff claims a commission of \$1080. The total claimed by plaintiff under these two accounts is \$3076.79. The parties are agreed that defendant at plaintiff's request made an advancement to him of \$723.26, which should be credited upon any sum found due to plaintiff. This leaves a balance of \$2353.53, the amount of the verdict upon which judgment was entered.

Defendant contends that plaintiff forfeited any payments which might have accrued on these accounts because he resigned his employment and entered into competition with defendant. It contends that plaintiff was obligated to give an entire as distinguished from a partial service with respect to these accounts, and that payment

of Mr. Thomas Gerstlein of 824 E. Michigan Avenue, Chicago. The evidence shows that a few days prior to this date Gerstlein entered into a partnership with Gerstlein by which they agreed to carry on an advertising business as co-partners.

The controversy between Plaintiff and Defendant concerns accounts which he obtained for defendant prior to that time. Plaintiff procured for defendant two orders for poster advertising from the Paige Motor Company, one for \$11,941.10 and another for \$14,682.72. Plaintiff also obtained from the Brown-Williamson Tobacco Company on May 21, 1934, an order for an advertisement through an electric apothecary display to be made in the city of New York. The advertisement was to continue for a period of three years beginning August 1, 1934. For the first twenty months the Tobacco Company was to pay \$2400 a month and for the remaining months of the contract \$1725 a month. The Motor Company during April and May paid to defendant on account of these contracts obtained by Plaintiff \$28,628.80. Plaintiff claims a commission on account thereof amounting to \$1986.79. From April to September, 1934, the Tobacco Company paid to defendant on account of the contract obtained for defendant by Plaintiff \$14,400, on which Plaintiff claims a commission of \$1080. The total claimed by Plaintiff under these two accounts is \$3072.79. The parties were first put defendant at Plaintiff's request made an advertisement to him of \$723.26, which should be credited upon any and all accounts due to Plaintiff. This leaves a balance of \$2349.53, the amount of the verdict upon which judgment was entered.

Defendant contends that Plaintiff failed to pay for the which might have accrued on these accounts because he retained his employment and entered into competition with defendant. It is contended that Plaintiff was obligated to give an entire and distinguished term a partial service with respect to these accounts, and that payment

of his commission was conditional upon the rendering by him of such complete service. The officials of the company and certain expert witnesses engaged in the advertising business gave testimony to the effect that in the usual course of business such entire performance would be proper, usual and customary.

Plaintiff meets this contention in two ways: First, he testified that there was nothing in the oral agreement which required such continued service on his part, as a condition precedent to payment of his commissions, but, second, he gave testimony tending to show that as a matter of fact he was and has been at all times able, ready and willing to give such continued service as to these two accounts. He says that he told Mr. Lutzen when quitting that he was at their service insofar as any accounts he had created for them were concerned.

Defendant has argued that under the evidence, as a matter of law, the judgment should be reversed without remanding because, as it says, the judgment is manifestly against the weight of the evidence, and because the proofs show that plaintiff was an agent of defendant who abandoned the continuing duties of his agency with defendant and entered into competition with it before the completion of his duties, and, moreover, because, it says, that the state of the proof is such that a new trial will not result in the production of different evidence, hence an absolute reversal without remanding is proper. Defendant cites Kiess v. Block & Kuhl Co., 205 Ill. App. 167, to this point, and calls our attention to the provisions of the Civil Practice act. (See Smith's Illinois Stats. 1935, chapter 110, sections 68 (b) of subsection 3 and paragraph (f) of section 92, pages 2434 and 2447.) The opinion in the Kiess case is only abstracted, and the abstract does not, as we understand, correctly state the law on this point. Neither do the sections of the Civil Practice act authorize, as

of his commission as commission upon the rendering by him of such complete service, the officials of the company and certain expert witnesses engaged in the advertising business have testified to the effect that in the usual course of business such service performance would be proper, usual and customary.

Plaintiff meets this contention in two ways: first, he testified that there was nothing in the oral agreement which required and continued service on his part, as a condition precedent to payment of his commissions, but, second, he has testified tending to show that as a matter of fact he was and has been at all times able, ready and willing to give such continued service as to these two accounts. He says that he told Mr. Latham when admitting that he was at their service insofar as any accounts he had created for them were concerned.

Defendant has argued that under the evidence, as a matter of law, the judgment should be reversed without remanding because, as it says, the judgment is manifestly against the weight of the evidence, and because the proofs show that plaintiff was an agent of defendant who abandoned the continuing duties of his agency with defendant and entered into competition with it before the completion of his duties, and, moreover, because, it says, that the state of the proof is such that a new trial will not result in the production of different evidence, hence an absolute reversal without remanding is proper. Defendant cites Woods v. Wood & Sons, 305 Ill. App. 187, to this point, and calls our attention to the provisions of the Civil Practice act. (See Watts's Illinois State, 1938, chapter 110, sections 63 (3) of subsection 3 and paragraph (1) of section 9, pages 2834 and 2847.) The opinion in the Woods case is only dicta, and the court said that, as we understand, correctly states the law on this point.

Neither do the sections of the Civil Practice act mentioned, as

defendant contends, a reversal without remandment in any case where an issue of fact has been properly submitted to a jury. In cases of trial without a jury this court may consider the facts and enter in this court the proper judgment without remanding the cause for a new trial, but that rule is not applicable where the trial is by jury, and the Civil Practice act has not changed the law in this respect. Illinois Tubercular Association v. Springfield Marine Bank, 282 Ill. App. 14; Capelle v. C. & N. W. Ry. Co., 280 Ill. App. 471; McCarthy v. Morrison, 283 Ill. App. 129.

Defendant, however, further contends that at any rate the judgment should be reversed and the cause remanded for another trial. One of its contentions in this respect is that the trial court, over the objection of counsel for defendant, permitted appellee to testify that Mr. Leach, vice-president of defendant, said to him in July or August, 1935, in substance that he was entitled to the commissions claimed; and that under his contract he was only required to bring in the orders to entitle him to his commission. Defendant says that there was no proof that Leach had anything to do with paying plaintiff's commissions or passing upon the question as to when his commissions were earned; that he was not hired by Leach, but that his employment was determined upon at a meeting of the directors of the defendant group held in New York, where the accounting office of defendant was located.

The testimony probably had considerable weight with the jury for the reason that the conversation was not denied by Leach, although he was ^a witness for defendant. Defendant cites Hoke v. Harrisburg Hospital, Inc., 231 Ill. App. 247, and Scoville Mfg. Co. v. Cassidy, 275 Ill. 462, cases we think clearly distinguishable. Leach, as a matter of fact, was in charge of the Chicago office, where plaintiff had his headquarters, and plaintiff's work was

defendant contends, a reversal without remand is not proper where an issue of fact has been properly submitted to a jury. In cases of trial without a jury this court may consider the facts and enter in this court the proper judgment without remanding the cause for a new trial, but that rule is not applicable where the trial is by jury, and the Civil Practice act has not changed the law in this respect. Illinois Telephone Association v. International Marine Bank, 282 Ill. App. 14; Copelle v. G. & W. Co., 280 Ill. App. 471; McCarthy v. Roysen, 282 Ill. App. 129.

Defendant, however, further contends that at any rate the judgment should be reversed and the cause remanded for another trial. One of its contentions in this respect is that the trial court, over the objection of counsel for defendant, permitted a police to testify that Mr. Leach, vice-president of defendant, said to him in July or August, 1935, in substance that he was entitled to the commissions claimed; and that under his contract he was only required to bring in the orders to enter him to his commission. Defendant says that there was no proof that Leach had anything to do with paying plaintiff's commissions or passing upon the question as to when his commissions were earned; that he was not hired by Leach, but that his employment was determined upon at a meeting of the directors of the defendant group held in New York, where the accounting office of defendant was located.

The testimony probably had considerable weight with the jury for the reason that the conversation was not denied by Leach, although he was a witness for defendant. Defendant cites Harshbarger Hospital, Inc., 282 Ill. App. 247, and Copelle v. G. & W. Co., 280 Ill. App. 471, cases we think clearly distinguishable. Leach, as a matter of fact, was in charge of the Chicago office where plaintiff had his headquarters, and plaintiff's work was

carried on largely under his direction during the three years plaintiff served the defendant. Leach also conducted the negotiations which resulted in the employment of plaintiff. Plaintiff had been referred to Leach in that regard by the president of defendant, and Leach communicated to plaintiff the decision of the board of directors that he should be employed. No evidence was introduced tending to show that the authority of Leach was limited in regard to the matter in controversy, and we hold that in the absence of the president and under all the circumstances the conversation was admissible, its weight being for the jury. Vincent v. Soper Lumber Co., 113 Ill. App. 466; Union Surety & Guaranty Co. v. Tenney, et al., 102 Ill. App. 95; affirmed in 200 Ill. 349.

Defendant also contends that the court erred in sustaining an objection to the testimony of one Harshaw, called by defendant. The court sustained an objection to a hypothetical question propounded to this witness calling for his opinion as to how long an "Account Executive" or solicitor or salesman "must service that account." As a matter of fact, the witness had in response to a prior interrogatory answered the question in substance. There is some question as to whether the witness was qualified as an expert concerning the Outdoor Advertising business, and we hold the court did not err in sustaining an objection to this question.

It is contended that the court erred in giving at the request of plaintiff the 15th instruction, which was to the effect that if the jury should find the issues in favor of the plaintiff, "then you should assess the plaintiff's damages in the sum of \$2353.53." If the plaintiff was entitled to recover at all, the amount was not in dispute. The fact that plaintiff obtained these orders from advertisers who theretofore had not been customers of defendant and the amount paid by them to defendant are undisputed. There is no dispute as to the computation or the credits which should

carried on largely under his direction during the three years of his employment. He also conducted the business which resulted in the employment of Plaintiff. Plaintiff had been referred to Leach in that regard by the President of defendant, and Leach communicated to Plaintiff the decision of the Board of Directors that he should be employed. No evidence was introduced tending to show that the authority of Leach was limited in regard to the matter in controversy, and we hold that in the absence of the Plaintiff and under all the circumstances the conversation was admissible. Its weight being for the jury. Winn v. Power, 113 Ill. App. 400; Union Security Co. v. Harvey, et al., 102 Ill. App. 348; affirmed in 200 Ill. 348.

Defendant also contends that the court erred in sustaining an objection to the testimony of one Larnshaw, called by defendant. The court sustained an objection to a hypothetical question propounded to this witness calling for his opinion as to how long an "Account Executive" or solicitor or salesman "must service that account." As a matter of fact, the witness had in response to a prior interrogatory answered the question in substance, "there is some question as to whether the witness was qualified as an expert concerning the Outdoor Advertising business, and we hold the court did not err in sustaining an objection to this question." It is contended that the court erred in giving at the request of Plaintiff the 15th instruction, which was to the effect that if the jury should find the issues in favor of the Plaintiff, "then you should assess the Plaintiff's damages in the sum of \$2352.52." If the Plaintiff was entitled to recover at all, the amount was not in dispute. The fact that Plaintiff obtained these orders from advertisers who laterators had not been customers of defendant and the amount paid by them to defendant are undisputed. There is no dispute as to the computation of the credits which would

be allowed. Defendant offered no evidence from which the jury might find that it had been damaged by the alleged failure of plaintiff to service the accounts, and therefore, if the jury was of the opinion, as a matter of fact, that plaintiff was entitled to recover, there was no question as to the amount of its verdict. There was no error in giving this instruction. Defendant also contends that the court erred in refusing to give, at defendant's request, the following instruction:

"The court instructs the jury that if you believe from the evidence that plaintiff's contract of employment not only required him to obtain contracts for advertising but that it required him to render various services until the expiration and completion of said advertising contracts, and if you further believe from the evidence that the advertising contracts in question in this case required further service to be performed by the plaintiff after he quit the employ of the defendant, and that said resignation was without cause on the part of the defendant, and if you further find that the plaintiff offered to render said services but that he placed himself in an improper position so that he was unable to render said services by entering the employ of a competitor of the defendant, then and in that event the plaintiff cannot recover commissions accruing after he quit the employ of the defendant and your verdict should be for the defendant."

The court refused to give this instruction, which refusal was one of the reasons urged by defendant upon the motion for a new trial and for judgment non obstante veredicto. This instruction was in substance covered by given instructions No. 4 and No. 5. It was not necessary that the court should instruct the jury twice as to the same propositions of law. Such instructions tend to confuse rather than to clarify the issue submitted to the jury.

Defendant, however, earnestly contends that the verdict and judgment are manifestly against the weight of the evidence. It is said that the appellee was his own sole witness; that his evidence was in some respects contradictory, and that upon every issue in the case he was contradicted by from four to eight witnesses. Defendant cites cases such as Donelson v. East St. Louis Ry. Co., 235 Ill. 625; Mabel v. C.C.C. & St. Louis R.R. Co., 264 Ill. App. 532; and Walters v. Checker Taxi Co., 265 Ill. App. 329, to the

be allowed. Defendant offered no evidence from which the jury might find that it had been deceived by the alleged failure of plaintiff to service the accounts, and, therefore, if the jury was of the opinion, as a matter of fact, that plaintiff was entitled to recover, there was no question as to the amount of its verdict. There was no error in giving this instruction. Defendant also contends that the court erred in refusing to give the following instruction:

"The court instructs the jury that if you believe from the evidence that plaintiff's contract of employment was not only assigned to him to obtain contracts for advertising but that it required him to render various services until the expiration and completion of said advertising contracts, and if you further believe from the evidence that the advertising contracts in question in this case required further service to be performed by the plaintiff after the only employment of the defendant, and that said defendant was without cause on the part of the defendant, and if on further finding that the plaintiff offered to render such services and that he placed himself in an improper position so that he was unable to render said services by entering the employ of a competitor of the defendant, then and in that event the plaintiff cannot recover compensation according to the terms of the contract of the defendant and your verdict should be for the defendant."

The court refused to give this instruction, which refusal was one of the reasons urged by defendant upon the motion for a new trial and for judgment non obstante verdicto. This instruction was in substance covered by given instructions 4 and 5. It was not necessary that the court should instruct the jury twice as to the same propositions of law. Such instructions tend to confuse rather than to clarify the issues submitted to the jury.

Defendant, however, earnestly contends that the verdict and judgment are manifestly against the weight of the evidence. It is said that the appellee was his own sole witness; that the evidence was in some respects contradictory, and that upon every issue in the case he was contradicted by other witnesses. Defendant cites cases such as Johnson v. Johnson, 235 Ill. 628; Wheeler v. Wheeler, 235 Ill. 628; Wheeler v. Wheeler, 235 Ill. 628; and Wheeler v. Wheeler, 235 Ill. 628.

point that it is the duty of the trial judge to set aside a verdict which is manifestly against the weight of the evidence. There is no doubt of that rule. It has been followed in this court in innumerable cases. The evidence in this case is not, however, so one-sided as defendant seems to think. There is a sharp conflict in the evidence as to whether, while discontinuing his agency for the company, plaintiff offered to perform any services, the need of which would arise thereafter in connection with these accounts, but the evidence to the effect that he was not asked to render any such services is uncontradicted. There is a very clear reason why such request was not and would not be made which is, that requests for such services furnished to solicitors fine opportunities for securing other and future orders for themselves. Any further orders plaintiff might secure were to go into the new agency with which he had become connected. There is no evidence in the record tending to show that it was agreed between the parties at the time plaintiff was hired that upon quitting the services he should forfeit commissions on accounts already taken unless he continued to render these services with relation thereto. There is much testimony to the effect that, generally speaking, in this business one who acted as a salesman or solicitor was expected to supply such service when needed. Quite naturally for the reason already given, namely, the opportunity of obtaining other and further contracts, such services would be performed upon request with alacrity.

We think the situation which arose was not in contemplation of the parties at the time of the making of the contract, nor provided for by any of its terms. The parties are agreed there was no provision in the contract as to the duration of the employment, and that it could be ended by either party at any time. The law of contracts with reference to conditions where, as here, performance of one promise extends over a period of time and the other does not,

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numerable cases. The evidence in this case is not, however, so un-
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such services furnished to solicitors the opportunity for securing
other and better orders for themselves. Any further orders plaintiff
might secure were to go to the new agency which he had become
connected. There is no evidence in the record tending to show that
it was agreed between the parties at the time plaintiff was hired
that upon quitting the services he should forfeit commissions on
accounts already taken unless he continued to render these services
with relation thereto. There is much testimony to the effect that,
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solicitor was expected to supply new service when needed. Quite
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is stated in the Restatement, Contracts, Section 270, to the effect that "the duty to fulfill the latter promise is, except as stated in Section 268 (2) conditional on the completion of the former, if the contract does not indicate the contrary by fixing dates or otherwise." In conformity with that rule, the courts of Illinois have held in numerous cases cited in the Illinois Annotations to the Restatement, Section 270, that a plaintiff may not recover for labor performed when he has wrongfully failed to work out the entire contract period. Here, however, no contract period was named by the parties. The contract in the very nature of things was divisible as to each account. Plaintiff contends that under the terms of the contract payment was due without regard to future services on the account. He also contends that he offered to perform such services. Issues of fact in these respects were submitted to the jury, which saw and heard the witnesses, and the trial court has approved the verdict of the jury. The fact that there was only one witness called for plaintiff while several testified for defendant, is not at all conclusive as to the weight of the evidence. We have often said that in this court the evidence is not counted but weighed. We have already, in connection with another objection, pointed out that the statement of the vice-president, Mr. Leach, in which liability of defendant was practically conceded, is not denied. Many of the witnesses for defendant testified to matters which we think wholly immaterial. Defendant offered no evidence tending to show that it was damaged by any failure of plaintiff to service the contracts for which he sues. We cannot say that the verdict is manifestly against the evidence.

Rule 7 of this court requires that "except on the cover" the parties shall be designated plaintiff and defendant, as in the trial court. This rule was not followed in the briefs filed

is stated in the Restatement, Contracts, Section 336, in the first part of the section that "the duty to fulfill the contract is, except as stated in Section 338 (2) conditional on the condition of the contract, if the contract does not indicate the contrary by its terms or otherwise." In conformity with that rule, the terms of the contract have been held in many cases to be the controlling factor in the determination of the contract, Section 336, that a contract is not to be enforced for labor performed when it has been found to be out of the entire contract period. Here, however, no contract period was stated by the parties. The contract in the very nature of things was divisible as to each account. Plaintiff contends that under the terms of the contract payment was to be made for the future services on the account. He also contends that he offered to perform such services. Issues of fact in these respects were submitted to the jury, which saw and heard the witnesses, and the trial court has approved the verdict of the jury. The fact that there was only one witness called for plaintiff's case is of no weight or effect for defendant, is not at all conclusive as to the weight of the evidence. We have often said that in this court the evidence is not counted but weighed. We have already, in connection with another objection, pointed out that the statement of the vice-president, Mr. Beach, in which liability of defendant was practically conceded, is not denied. Any of the witnesses for defendant testified to matters which we think wholly immaterial. Defendant offered no evidence tending to show that it was damaged by any failure of plaintiff to service the contract for which he sued. We cannot say that the verdict is manifestly against the evidence.

Rule 7 of this court requires that "evidence in the case" be presented in the form of a bill of particulars, as in the trial court. This rule was not followed in the trial court.

in this case. Compliance with the rule would have lessened the labors of the court.

The judgment is affirmed.

AFFIRMED.

O'Connor and McSurely, JJ., concur.

in this case. Compliance with the rule will have lessened

the labors of the court.

The judgment is affirmed.

ATTORNEY.

O'Connor and McNulty, Jr., counsel.

38989

OTTO W. SCHLAU,
Appellant,

vs.

A. A. MUELLER,
Appellee.

537
APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

287 I.A. 623²

MR. JUSTICE MCSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff sought to recover rental of \$90 for November, 1935, for an apartment vacated by defendant in October; upon trial plaintiff suffered an adverse verdict and appeals from the judgment.

Plaintiff's case rests upon a provision in a written lease to defendant expiring April 30, 1935, that the lease would be extended from year to year after its expiration unless either party gave the other not less than sixty days previous notice in writing of his intention to terminate the lease upon its expiration. No written notice of termination was given and defendant continued to occupy until October 30, 1935, paying all rent to November 1st.

Plaintiff argues that the lease was by this provision automatically extended for a year. Defendant contends that there was an oral agreement between the parties that after the expiration of the lease the tenancy would be on a month to month basis.

The evidence before the jury showed that defendant first leased the premises from plaintiff in October, 1931, and signed a one year lease; at the expiration of that lease another was signed, and again, at the expiration of that lease defendant signed another for a year, which expired September 30, 1934. Defendant testified that at this latter date, when the matter of another yearly lease was under consideration, he told plaintiff he did not wish to obligate himself for a period longer than six months as he was looking

OTTO W. SCHULAU,

Appellant,

vs.

A. A. HUMMEL,

Appellee.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

DO NOTED

287 I.A. 323

THE UNITED STATES DEPARTMENT OF JUSTICE

Plaintiff sought to recover rental of \$20 per November, 1935, for an apartment vacated by defendant in October; upon trial plaintiff entered an adverse verdict and sought from the judgment.

Plaintiff's case rests upon a provision in a written lease to defendant expiring April 30, 1935, that the lease would be extended from year to year after its expiration unless either party gave the other not less than sixty days previous notice in writing of his intention to terminate the lease on its expiration. No written notice of termination was given and defendant continued to occupy until October 30, 1935, giving all rent to November 1st.

Plaintiff argues that the lease was by this provision automatically extended for a year. Defendant contends that there was an oral agreement between the parties that after the expiration of the lease the tenancy would be on a month to month basis. The evidence before the jury showed that defendant first

leased the premises from plaintiff in October, 1931, and signed a one year lease; at the expiration of that lease another was signed, and again, at the expiration of that lease defendant signed another for a year, which expired September 30, 1934. Defendant testified that at this latter date, when the matter of another yearly lease was under consideration, he told plaintiff he did not wish to continue himself for a period longer than six months as he was leaving

around for a home and when he found a satisfactory place he would move from the apartment; that because of this it would not be necessary for plaintiff to do any decorating in the apartment; that plaintiff thereupon prepared the new lease, which was executed by both parties, running from October 1, 1934, to April 30, 1935, a period of seven months.

About March 1, 1935, plaintiff left another form of lease at defendant's home, leasing the apartment for a year, commencing May 1, 1935, ending April 30, 1936; thereupon defendant told plaintiff he was still looking for a home and did not care to obligate himself on any lease and that as soon as he found a home he would move; that plaintiff said this was "satisfactory." The form of lease for a year, commencing May 1, 1935, was never signed by defendant and no request was made to him to sign it. In September, 1935, defendant notified plaintiff's wife that he was going to move and told her to inform her husband; later defendant told plaintiff he was going to move and plaintiff objected, and some argument followed as to whether defendant was responsible by virtue of the sixty day provision in the written lease from October 1, 1934, to April 30, 1935, upon which plaintiff is suing. Defendant moved October 30, 1935, and returned the keys by registered mail.

The jury could properly believe that there was an oral agreement between the parties that after the expiration of the lease on April 30, 1935, defendant should occupy on a month to month tenancy. It is well settled that it may be shown by parol that the parties have agreed to terminate the obligations of a written lease. McNeill v. Harrison & Sons, Inc., 286 Ill. App. 120; Jacob v. Mundell, 267 Ill. App. 160; Weber v. Powers, 213 Ill. 370; Hymen v. Anschicks, 270 Ill. App. 202; London Guarantee & Accident Co. v. Steinberg, 264 Ill. App. 31.

around for a home and when he found a satisfactory place he would move from the apartment; that because of this it would not be necessary for plaintiff to do any decorating in the apartment; that plaintiff thereupon prepared the new lease, which was executed by both parties, running from October 1, 1934, to April 30, 1935, a period of seven months.

About March 1, 1935, plaintiff left another town of lease at defendant's home, leasing the apartment for a year, commencing May 1, 1935, ending April 30, 1936; thereupon defendant told plaintiff he was still looking for a home and did not care to obligate himself on any lease and that as soon as he found a new home he would move; that plaintiff said this was "satisfactory." The term of lease for a year, commencing May 1, 1935, was never signed by defendant and no request was made to him to sign it. In September, 1935, defendant notified plaintiff's wife that he was going to move and told her to inform her husband; later defendant told plaintiff he was going to move and plaintiff objected, and some argument followed as to whether defendant was responsible by virtue of the sixty day provision in the written lease from October 1, 1934, to April 30, 1935, upon which plaintiff is suing. Defendant moved October 30, 1935, and returned the keys by registered mail.

The jury could properly believe that there was an oral

agreement between the parties that after the expiration of the lease on April 30, 1935, defendant should occupy on a month to month tenancy. It is well settled that it may be known by oral agreement that the parties have agreed to terminate the obligation of a

written lease. Bozell v. Harrison & Sons, Inc., 280 Ill. App. 100;

Jacob v. Wundell, 267 Ill. App. 100; Leber v. Jagers, 212 Ill. App. 200;

Hyman v. Anaschick, 270 Ill. App. 200; Leber v. Jagers, 212 Ill. App. 200;

Co. v. Steinberg, 234 Ill. App. 21.

Plaintiff asserts it was error to admit in evidence, at the instance of defendant, a letter sent from plaintiff's attorneys to defendant prior to the institution of the suit. It is contended that it prejudiced plaintiff before the jury in that the letter implied that plaintiff in October, 1935, prior to the date defendant vacated the premises, did not believe defendant was occupying under the extension provision of the lease upon which he is relying in this suit. The letter was written by the same attorneys who prepared the statement of claim and who tried the case in the trial court. It purported to state plaintiff's theory of his claim, and if this was not consistent with the claim made in his statement of claim in this action defendant was entitled to show this. Stave v. Great A. & P. Tea Co., 262 Ill. App. 221.

The question involved is principally one of fact. The jury accepted the evidence of the defendant and found accordingly. We cannot say this is against the manifest weight of the evidence.

The judgment is affirmed.

AFFIRMED.

Matchett, P. J., and O'Connor, J., concur.

Plaintiff asserts it was error to admit in evidence, as the instance of defendant, a letter sent from Plaintiff's attorney to defendant prior to the institution of the suit. It is contended that it prejudiced Plaintiff before the jury in that the letter implied that Plaintiff in October, 1933, prior to the date defendant vacated the premises, did not believe defendant was occupying under the extension provision of the lease upon which he is relying in this suit. The letter was written by the same attorneys who prepared the statement of claim and who tried the case in the trial court. It purports to state Plaintiff's theory of his claim, and it this was not consistent with the claim made in his statement of claim in this action defendant was entitled to know this. Great A. & P. Tea Co., 202 Ill. App. 281.

The question involved is practically one of fact. The jury accepted the evidence of the defendant and found accordingly. We cannot say this is against the weight of the evidence. The judgment is affirmed.

REVEREND.

Kelchett, B. J., and O'Connor, J., concur.

39006

ALICE GALTER (LIGHTER),
Appellant.

vs.

LOUIS GALTER,
Appellee.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

287 I.A. 623³

MR. JUSTICE MCSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff appeals from a decree which modified a former decree touching the custody of a minor child about four years old.

January 25, 1934, a decree of divorce was entered in the Superior court dissolving the marriage relation between the parties, and the custody of the child, Rachel, during minority was awarded to the mother, except that defendant should have the right to visit and be with the child at least three Sundays of each month and also have the right to her care and custody during the summer vacation of each year.

Plaintiff remarried January 31, 1935, and is now known as Alice Lighter. June 12, 1935, defendant filed his verified petition setting forth the provisions of the decree with reference to the custody of the child and alleging that plaintiff was no longer a fit person to have custody of the child because of her new marital status; that her husband, Stephen Lighter, is not a fit person to reside in the same household with the minor child; that certain influences have changed plaintiff's mentality to the point of mental aberrations, and that she has threatened to take the child out of the jurisdiction of the court in order to defeat defendant's visitation privileges. Petitioner asked for a modification of the decree of January 25 and that the custody of the child be awarded to him, or that the terms of the decree be so modified that defendant would have custody of the child at certain specific and reasonable periods of time each week and during the summer, and particularly

39006

ALICE GALTHER (PLAINTIFF),

vs.

vs.

LOUIS GALTHER,

Defendant.

APPEAL FROM SUPERIOR COURT

OF COOK COUNTY.

287 I.A. 623

MR. JUSTICE MAURICE DELIVERED THE OPINION OF THE COURT.

Plaintiff appeals from a decree which modified a former decree touching the custody of a minor child about four years old. January 25, 1934, a decree of divorce was entered in the Superior Court dissolving the marriage relation between the parties, and the custody of the child, Rachel, during minority was awarded to the mother, except that defendant should have the right to visit and be with the child at least three Sundays of each month and also have the right to her care and custody during the summer vacation of each year.

Plaintiff renewed January 31, 1935, and is now known as Alice Lighter. June 12, 1935, defendant filed his verified petition setting forth the provisions of the decree with reference to the custody of the child and alleging that plaintiff was no longer a fit person to have custody of the child because of her new marital status; that her husband, Stephen Lighter, is not a fit person to reside in the same household with the minor child; that certain financials have changed plaintiff's mentality as the point of mental operations, and that she has threatened to take the child out of the jurisdiction of the court in order to prevent defendant's visitation privileges. Plaintiff seeks for a modification of the decree of January 25 and that the custody of the child be awarded to him, or that the terms of the decree be so modified that defendant would have custody of the child at certain specified and reasonable periods of time even when during the summer, and particularly

over the week-ends.

After hearing evidence the court modified the decree with respect to the visitation rights of the defendant and ordered that he should have the child under his care and custody during the first three week-ends of each month until the further order of court, and also during one month of each summer vacation period, defendant to select the month, notifying plaintiff of the time thirty days in advance. Both parties were restrained from taking the child out of Illinois for other than vacation periods without the written consent of each other or an order of court. Plaintiff appeals from this order and argues that the court in making these modifications abused its discretion.

In such a proceeding the court may, on application from time to time, make such alterations with reference to the custody of children as shall appear reasonable and proper. Ill. State Bar Stats. 1935, chap. 40, par. 19. Stafford v. Stafford, 299 Ill. 438. And where conditions have changed since the entry of the original order, the court has discretion to modify it. Thomas v. Thomas, 233 Ill. App. 488.

It is unnecessary to relate at length the testimony presented on the hearing. For the most part it consists of recriminations. Defendant testified that in February, 1935, he was told that he could not take the child any more, and that from that time until June, 1935, he was unable to see her; that although he attempted to have the child during the summer, as provided for in the original decree, yet he was unable to do so; that when he called for the child in August plaintiff told him he could not have her; that at one time he attempted to talk with the child over the telephone and plaintiff told him she was very ill and could not come to the telephone; thereupon defendant announced that he was going immediately to see the child and plaintiff replied, "I won't let you in"; that when he

over the week-ends.

After hearing evidence the court modified the decree with respect to the visitation rights of the defendant and ordered that he should have the child under his care and custody during the first three week-ends of each month until the further order of court, and also during one month of each summer vacation period, defendant to select the month, notifying plaintiff of the time thirty days in advance. Both parties were restrained from taking the child out of Illinois for their own vacation periods without the written consent of each other or an order of court. Plaintiff appeals from this order and argues that the court in making these modifications abused its discretion.

In such a proceeding the court may, on application from time to time, make such alterations with reference to the custody of children as shall appear reasonable and proper. Ill. Stat. Sec. 100-1. State, 1935, Supp. 40, par. 19, Section 100-1, 1935 Ill. App. 488. And where conditions have changed since the entry of the original order, the court has discretion to modify it. Thomas v. Thomas, 233 Ill. App. 488.

It is unnecessary to relate at length the testimony presented on the hearing. For the most part it consists of recriminations. Defendant testified that in February, 1935, he was told that he would not take the child any more, and that from that time until June, 1935, he was unable to see her; that although he attempted to have the child during the summer, as provided for in the original decree, yet he was unable to do so; that when he called for the child in August plaintiff told him he could not have her; that at some time he attempted to talk with the child over the telephone and plaintiff told him she was very ill and could not come to see him; that the reason defendant announced that he was going immediately to see the child and plaintiff replied, "I won't let you in"; that when he

went to plaintiff's home he was not allowed to enter or to be alone with the child, plaintiff saying that she must consult her husband, meaning Mr. Lighter; that in February, 1935, plaintiff told defendant he could not take the child any more; that he might call and see her for a few minutes once in awhile; that on one occasion when he called he found that the child could not stand and, inquiring of plaintiff as to the cause, was told that the child was "cranky - she wants to have her own way"; defendant was told that she had been sitting on the floor, refusing to stand up, for about two weeks; upon defendant's insistence the child was taken to a hospital and X-rayed and definite fractures of the bones of a leg were found; that plaintiff never explained how this happened.

On one occasion a sister of defendant, as was her habit, sent the child a gift which was returned with a note from plaintiff saying, "we have no use for any gifts from you." Another sister of defendant testified that when in November, 1935, she came to Chicago, she telephoned to plaintiff that she would like to speak with Rachel, the child, as she had not seen her for over a year, and was told she could not see the child, but to get in touch with plaintiff's lawyer; that she replied she was coming to plaintiff's home to see the child but was warned not to do so.

The chancellor also heard evidence tending to show that Stephen Lighter, husband of plaintiff, was an unfit person to associate with a young child. On one occasion when defendant called for the child Lighter abused him with swearing and obscene epithets and threatened to have him "bumped off" if he did not leave the house. Counsel for defendant asserts that the court also considered a report of the Bureau of Public Welfare, but we do not find it in the record.

The question is whether, upon the evidence, of which we have narrated a small part, the court abused its discretion in modifying

sent to plaintiff's name he was not allowed to enter or be alone with the child, plaintiff saying that she must consult her husband, assuming to be plaintiff's husband; that in February, 1922, plaintiff told defendant that she would not take the child any more; that on night call was sent her for a few minutes once in awhile; that on one occasion when he called he found that the child could not speak and, indicating to plaintiff as to the cause, was told that the child was "paralyzed" - she wrote to have her own way; defendant was told that she had been sitting on the floor, refusing to stand up, for about two weeks; upon defendant's instance the child was taken to a hospital and X-rayed and definite fractures of the bones of a leg were found; that plaintiff never explained how this happened.

On one occasion a sister of defendant, as was her name, sent the child a gift which was returned with a note from plaintiff saying, "we have no use for any gifts from you." Another sister of defendant testified that when in November, 1922, she came to Chicago, she testified to plaintiff that she would like to share with her the child, as she had not seen her for over a year, and was told she could not see the child, but to get in touch with plaintiff's lawyer; that she testified she was coming to plaintiff's home to see the child but was warned not to do so.

The chancellor also heard evidence tending to show that Stephen Lighter, husband of plaintiff, was an adult person who associated with a young child. On one occasion when defendant called for the child Lighter showed him with swearing and obscene language and threatened to have him "pounded out" if he did not leave the house. Counsel for defendant asserts that the matter also constituted a part of the Bureau of Child Welfare, but he is not able to produce records.

The question is whether, upon the evidence, it can be said that a small part, the court should be directed to withhold

the decree. It is well established that where the evidence is conflicting the conclusion of the trial court, who heard the evidence and observed the witnesses, should not be reversed unless manifestly against the weight of the evidence. Garvy v. Garvy, 282 Ill. App. 485; Floberg v. Floberg, 358 Ill. 626.

The modification which is challenged is not drastic but reasonable, and the chancellor did not abuse his discretion in entering the order. It is affirmed.

AFFIRMED.

Matchett, P. J., and O'Connor, J., concur.

the record. It is well established that where the evidence is conflicting the conclusion of the trial court, who heard the evidence and observed the witnesses, should not be reversed unless manifestly against the weight of the evidence. Garvy, 288 Ill. App. 485; People v. [illegible], 282 Ill. App. 485.

The modification which is claimed is not drastic and reasonable, and the chancellor did not abuse his discretion in entering the order. It is affirmed.

Reversed.

Reversed. J. J. and O'Connor, J. J., concur.

ELLA KOLB,
Appellant,

vs.

GERTRUDE KOLB, nee
GERTRUDE GABRIEL,
Appellee.

55 A
APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

287 I.A. 623⁴

MR. JUSTICE MESURELY DELIVERED THE OPINION OF THE COURT.

This is an alienation of affections suit, tried by the court, in which after hearing the evidence the court found for the defendant, and plaintiff appeals from the judgment.

Plaintiff's brief has wholly disregarded Rule 7 of this court and might well have been stricken. However, in the interests of economy to the litigants we have considered the case on its merits.

Only questions of fact are presented. Norbert E. Kolb and Ella Kolb, plaintiff, were married October 10, 1921; it was not a happy marriage; the couple were "scrapping and fighting" constantly; Kolb testified that his wife would not have children. Kolb, while continuing to live with his wife, was unfaithful to her and had illicit relations with other women; in 1931 he lived for about six months in Indianapolis, having improper relations with another woman; he first met defendant, Gertrude Gabriel, in January, 1932; he told her his name was Tom Rourke as he did not want her to know he was married; in July, 1932, he first told her he was a married man and that his right name was Norbert Kolb, but he also told her he was separated from his wife; that divorce proceedings were in process and that as soon as he obtained a divorce he would marry her. Kolb testified that when defendant learned he was a married man she and her mother told him to quit paying attention to defendant, and that he threatened to shoot her if she should quit him.

In October, 1932, Mr. and Mrs. Kolb apparently agreed upon

UNITED STATES DISTRICT COURT
OF SOUTHERN DISTRICT OF NEW YORK

8871A.623

ELIA KOLB, Appellant,
vs.
GERTHIE KOLB, nee
GERTHIE GARRICK, Appellee.

THE JUSTICE RESPECTFULLY SUBMITTED THE OPINION OF THE COURT.

This is an application of attachment writ, filed by the court, in which after hearing the evidence the court found for the defendant, and plaintiff appeals from the judgment.

Plaintiff's brief has wholly disregarded Rule 7 of this court and might well have been stricken. However, in the interests of economy to the litigants we have considered the case on its merits.

Only questions of fact are presented. Plaintiff, Elia Kolb, was married October 10, 1931; it was not a happy marriage; the couple were "separating and living" separately; Kolb testified that his wife would not have children. Kolb, while continuing to live with his wife, was unwilling to get and had illicit relations with other women; in 1931 he lived for about six months in Indianapolis, having improper relations with another woman; he first met defendant, Gertrude Garrick, in January, 1932; he told her his name was Tom Kourie and he did not want her to know he was married; in July, 1932, he told her he was a married man and that his right name was Robert Kolb, but he also told her he was separated from his wife; and divorce proceedings were in process and that as soon as he obtained a divorce he would marry her. Kolb testified that when defendant learned he was a married man she and her mother told him to quit paying attention to defendant, and that he threatened to shoot her if she would not stop. In October, 1932, Mr. and Mrs. Kolb separately agreed upon

a divorce and December 1, 1932, an agreement in writing was entered into by them reciting that they were separated, not living together as husband and wife; that it was their desire to settle the property rights of each and it was agreed that Norbert Kolb should pay to Ella Kolb \$19,000 in full settlement of all claim she might have against him by virtue of the marital relation. Apparently it was agreed that Kolb should go to Reno, Nevada, to obtain a divorce, and it was stipulated that attorneys in Reno should file Ella Kolb's appearance in the divorce proceeding. After he had been in Reno a few days he received a telegram from plaintiff saying the house had been robbed, and he returned to Chicago, not having obtained a divorce. He then told plaintiff about defendant and brought defendant and her sister to meet his wife; all the parties had dinner together at Kolb's home; at another time what was called an "engagement party" was held, at which Mrs. Kolb and defendant and other members of both families were present; at this party Kolb gave defendant an engagement ring. Kolb testified that Mrs. Kolb never raised any protest to his going with defendant or becoming engaged to her; that she was willing he should marry defendant provided she, plaintiff, could get another husband; that Kolb was active in this and matrimonial advertisements were placed in a newspaper and prospective husbands were interviewed by plaintiff, accompanied by her husband. Mrs. Kolb denied the testimony of Mr. Kolb that she was interested in getting another husband. Plaintiff procured a divorce from Kolb in January, 1934, and he married defendant in February.

Defendant argues that the record shows that long prior to the time defendant met the husband he had lost all love and affection for his wife and was living a life of unfaithfulness toward her; that there is no evidence of any acts on the part of defendant

a divorce and December 1, 1934, an agreement in writing was entered into by them reciting that they were separated, not living together as husband and wife; that it was their desire to settle the property rights of each and it was agreed that hereafter each should have Wife Kolb \$15,000 in full settlement of all claims and rights against him by virtue of the marital relation. Apparently it was agreed that Kolb should go to Reno, Nevada, to obtain a divorce, and it was stipulated that attorneys in Reno should file Wife Kolb's appearance in the divorce proceedings. After he had been in Reno a few days he received a telegram from plaintiff saying the house had been robbed, and he returned to Chicago, not having obtained a divorce. He then told plaintiff about defendant and brought defendant and her sister to meet his wife; all the parties had dinner together at Kolb's home; at another time there was called an "engagement party" was held, at which Mrs. Kolb and defendant and other members of both families were present; at this party Kolb gave defendant an engagement ring. Kolb testified that Mrs. Kolb never raised any protest to his going with defendant and or becoming engaged to her; that she was willing he should marry defendant provided she, plaintiff, could get another divorce; that Kolb was active in this and matrimonial advertisements were placed in a newspaper and prospective husbands were interviewed by plaintiff, accompanied by her husband. Mrs. Kolb denied the testimony of Mr. Kolb that she was interested in getting another husband. Plaintiff procured a divorce from Kolb in January, 1934, and he married defendant in February. Defendant argues that the record shows that long prior to the time defendant met the husband he had lost all love and affection for his wife and was living a life of unbridledness toward her; that there is no evidence at any time on the part of defendant

tending to alienate the affections of the husband, and that the actions of the husband in wooing defendant and becoming engaged to her were with the consent of plaintiff.

The trial court in his opinion finds that defendant was socially accepted in the family of the plaintiff, knowing that Kolb expected to marry her, and that no word was said to defendant that she was doing an injustice to the wife. Plaintiff did testify that at one time she went to defendant and asked her to release her husband or let him alone. This was denied by defendant, and there was other definite testimony tending to discredit plaintiff's story in this respect.

When plaintiff procured her divorce she received, in addition to the \$19,000 previously received by her, the sum of \$6500 paid to her by the husband. The trial court found that plaintiff had willingly parted from her husband for a consideration, that what was done by defendant could not possibly have been done without the aid of the wife, and that if there was a conspiracy the wife participated in it.

We are of the opinion that this conclusion was justified, and the judgment is affirmed.

AFFIRMED.

Matchett, P. J., and O'Connor, J., concur.

tending to alienate the affection of the husband, and that the actions of the husband in wooing defendant and becoming engaged to her were with the consent of plaintiff.

The trial court in its opinion finds that defendant was socially accepted in the family of the plaintiff, knowing that she was doing an injustice to the wife. Plaintiff did testify that at one time she went to defendant and asked her to remove her husband or let him alone. This was denied by defendant, and there was other definite testimony tending to establish plaintiff's story in this respect.

When plaintiff procured her divorce she received, in addition to the \$10,000 previously received by her, the sum of \$500 paid to her by the husband. The trial court found that plaintiff had willingly parted from her husband for a consideration, that what was done by defendant could not possibly have been done without the aid of the wife, and that if there was a conspiracy the wife participated in it.

We are of the opinion that this conclusion was justified, and the judgment is affirmed.

REVEREND.

Matchett, P. J., and O'Connor, J., concur.

38958

GEORGE A. GILES,)
Appellee,)

vs.)

GRADY & NEARY INK COMPANY,)
a Corporation,)
Appellant.)

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

287 I.A. 624¹

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit against the defendant to recover \$86.75 for "wages and commissions for services rendered by the plaintiff to the defendant as a salesman." Plaintiff also claimed \$25 for his attorney's fees. Defendant was defaulted for want of appearance and plaintiff's damages were "assessed by the Court on Affidavit of Claim" at \$111.75. More than 30 days after the judgment was entered, the court on defendant's motion opened up the judgment and gave it leave to defend. Plaintiff appealed from this order to this court where the order of the trial court was reversed. (No. 38587, Giles v. Grady & Neary Ink Company.) In the opinion there filed we said, "In the instant case the record discloses that defendant neglected to appear, although it was served with summons; therefore the court was not warranted in opening up the judgment.

"And while the record discloses that the court was not warranted in entering judgment against defendant on his statement of claim because it was not verified, yet that question is not before us on this appeal. And as said in the Lynn case (279 Ill. App. 210 - 214): 'Defendants may have some relief, but it is not by a proceeding such as this.'"

Subsequently defendant filed a petition in this court for leave to appeal, which we have heretofore granted. And, as stated in our former opinion, plaintiff's statement of claim was not verified. Defendant was served with summons but failed to appear, it was defaulted for want of appearance, and the court assessed the

GEORGE A. GILES,

Appellee,

vs.

GRADY & MARY INC COMPANY,

a Corporation,

Appellant.

MR. JUSTICE O'DONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit against the defendant to recover

\$86.75 for "wages and commissions for services rendered by the

plaintiff to the defendant as a salesman." Plaintiff also claimed

\$35 for his attorney's fees. Defendant was defaulted for want of

appearance and plaintiff's damages were "assessed by the court on

Affidavit of Claim" at \$111.75. More than 30 days after the judg-

ment was entered, the court on defendant's motion opened up the

judgment and gave it leave to defend. Plaintiff appealed from this

order to this court where the order of the trial court was reversed.

(No. 38587, Giles v. Grady & Mary Inc Company.) In the opinion

there filed we said, "In the instant case the record discloses that

defendant neglected to appear, although it was served with summons;

therefore the court was not warranted in opening up the judgment.

"And while the record discloses that the court was not

warranted in entering judgment against defendant on his statement

of claim because it was not verified, yet that question is not re-

fore us on this appeal. And as said in the Lyons case (235 Ill.

App. 210 - 214): 'Defendants may have some belief, but it is not

by a proceeding such as this.'"

Subsequently defendant filed a petition in this court for

leave to appeal, which we have heretofore granted. And, as stated

in our former opinion, plaintiff's statement of claim was not

verified. Defendant was served with summons and failed to appear,

it was defaulted for want of appearance, and the court assessed the

damages on plaintiff's "Affidavit of Claim." There was no affidavit of claim filed on behalf of plaintiff, as required by Rule 111 of the Municipal court, and the judgment was erroneous.

But plaintiff contends that the judgment was entered in accordance with the provisions of the Civil Practice act. If we assume that the Civil Practice act applied, which we do not decide, there is no merit in plaintiff's contention. Section 57 of the Civil Practice Act, chap. 110, Ill. State Bar Stats. 1935, provides that where plaintiff brings an action upon a contract, express or implied, and files "an affidavit * * * of the truth of the facts upon which his complaint is based and the amount claimed (if any) over and above all just deductions, credits and set-offs (if any), the court shall, upon plaintiff's motion, enter a judgment in his favor for the relief so demanded, unless the defendant shall, by affidavit of merits filed prior to or at the time of the hearing on said motion, show that he has a sufficiently good defense on the merits to all or some part of the plaintiff's claim to entitle him to defend the action."

No affidavit to his claim having been filed by plaintiff, it was error for the court to enter judgment.

The judgment of the Municipal court of Chicago is reversed and the cause is remanded for a trial on the merits.

REVERSED AND REMANDED.

Matchett, P. J., and McSurely, J., concur.

...on plaintiff's affidavit of damages. There was no affidavit of damages filed on behalf of plaintiff, as required by law. All of the Municipal Court, and the judgment was affirmed. But plaintiff contends that the judgment was entered in accordance with the provisions of the Civil Practice Act. It is assumed that the Civil Practice Act applied, which on its face provides there is no merit in plaintiff's contention. Section 17 of the Civil Practice Act, Chap. 110, Ill. Stat. Sec. 110-17, provides that where plaintiff brings an action upon a contract, and it is implied, and files "an affidavit of damages" of the facts of the case upon which his complaint is based and the amount claimed (if any), over and above all just deductions, credits and offsets (if any), the court shall, upon plaintiff's motion, enter a judgment in his favor for the relief so demanded, unless the defendant shall, by affidavit of merits filed prior to or at the time of the hearing on said motion, show that he has a substantial defense to the merits to all or some part of the plaintiff's claim to entitle him to defend the action."

...no affidavit to his claim having been filed by plaintiff, it was error for the court to enter judgment.

The judgment of the Municipal Court of Chicago is reversed and the case is remanded for a trial in the merits.

REVEREND AND HONORABLE

Matsonett, J., and McGarvey, J., concur.

39040

PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,

vs.

PETER G. DeMET,
Plaintiff in Error.

7
ERROR TO MUNICIPAL COURT
OF CHICAGO.

287 I.A. 624²

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

An information was filed charging that defendant, Peter G. DeMet, was president of the Publix Profit Sharing Cafeteria, a corporation, which was conducting a restaurant in Chicago, and that it failed and refused to file a return with the Department of Finance of the State of Illinois, as required by the statute (sec. 3, chap. 120, Ill. State Bar Stats.); that DeMet directed and controlled the business of the restaurant corporation and aided, assisted and encouraged it in the violation of the law. There was a trial before the court without a jury, DeMet was found guilty and sentenced to confinement at labor in the House of Correction of Chicago for a period of six months and a fine of \$5000 was imposed; he prosecutes this writ of error.

Defendant relies for reversal on the law as announced in the case of People v. Duncan, 363 Ill. 495, where it was held that one cannot be imprisoned as an accessory before the fact under the provision of the Criminal Code for violation of the Motor Fuel Tax Act, where the principal is a corporation, because an accessory before the fact cannot, under the law, be more severely punished than his principal.

In that case an indictment was returned against Duncan charging that, as an accessory before the fact, he was guilty of violating the Motor Fuel Tax Act in that his principal failed and refused to report to the Department of Finance the sales of each month. Duncan was president of the Blue Rose Oil Company, a cor-

PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,

vs.

PETER G. DEMET,
Plaintiff in Error.

287 I.A. 624

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

An information was filed charging that defendant, Peter G. Demet, was president of the "Palix Trading Catering Corporation," which was conducting a restaurant in Chicago, and that it failed and refused to file a return with the Department of Finance of the State of Illinois, as required by the statute (sec. 3, chap. 120, Ill. State Bar Statute); that Demet directed and controlled the business of the restaurant corporation and aided, assisted and encouraged it in the violation of the law. There was a trial before the court without a jury, Demet was found guilty and sentenced to confinement at labor in the house of correction of Chicago for a period of six months and a fine of \$500 was imposed; he prosecutes this writ of error.

Defendant relies for reversal on the law as announced in the case of People v. Dunham, 363 Ill. 485, where it was held that one cannot be imprisoned as an accessory before the fact under the provision of the Criminal Code for violation of the Motor Fuel Tax Act, where the principal is a corporation, because an accessory before the fact cannot, under the law, be more severely punished than his principal.

In that case an indictment was returned against Dunham charging that, as an accessory before the fact, he was guilty of violating the Motor Fuel Tax Act in that his principal failed and refused to report to the Department of Finance the sales of each month. Dunham was president of the Blue Rose Oil Company, a cor-

peration, and virtually controlled its policies. The Court said that the Accessory Statute, sec. 2, div. 2, chap. 38, which defined an accessory, provided that he "shall be considered as principal, and punished accordingly," and that the penalty for a violation of the Motor Fuel Tax Act by the principal was a fine not to exceed \$5000 or imprisonment in the penitentiary for not less than one year or more than five years, or by both such fine and imprisonment. The Court also said (p. 498): "The penalty provisions of the Motor Fuel Tax act cannot be applied to imprison^a a natural person who is an accessory before the fact, where his principal is a corporation. To that extent we hold by this opinion, that the accessory statute, dealing with accessories before the fact, is repugnant to and cannot be harmonized with the penalty section of the Motor Fuel Tax act involved in this case."

In the instant case Delmet is charged as an accessory before the fact, and the penalty imposed by section 13 of the Retailers' Occupation Tax Act (par. 438, chap. 120, Ill. State Bar Stats.) is a fine of not more than \$5000, or imprisonment in the county jail for not less than one month nor more than six months, or both fine and imprisonment, in the discretion of the court.

We see no substantial difference between the provisions of the Motor Fuel Tax act, involved in the Duncan case, and the section of the Retailers' Occupation Tax act. In fact, counsel for The People in their brief admit that the Duncan case is in point, but argue that the decision in that case is wrong. Obviously this contention is without merit and cannot be entertained by this court.

The judgment of the Municipal court of Chicago is reversed.

JUDGMENT REVERSED.

Matchett, P. J., and McSurely, J., concur.

operation, and virtually controlled its policies. The Court said that the Accessory Statute, sec. 5, div. 5, chap. 38, which defined accessory, provided that he "shall be considered as principal, and punished accordingly," and that the penalty for a violation of the Motor Fuel Tax Act by the principal was a fine not to exceed \$5000 or imprisonment in the penitentiary for not less than one year or more than five years, or by both with fine and imprisonment. The Court also said (p. 438): "The penalty provisions of the Motor Fuel Tax act cannot be applied to accessory persons who is an accessory before the fact, where his principal is a corporation. To that extent we hold by this opinion, that the accessory statute, dealing with accessories before the fact, is repugnant to and cannot be harmonized with the penalty section of the Motor Fuel Tax act involved in this case."

In the instant case Doherty is charged as an accessory before the fact, and the penalty imposed by section 13 of the Retailers' Occupation Tax Act (par. 435, chap. 130, Ill. Stat. Sec. 13) is a fine of not more than \$5000, or imprisonment in the county jail for not less than one month nor more than six months, or both fine and imprisonment, in the discretion of the court. We see no substantial difference between the provisions of the Motor Fuel Tax act, involved in the Duncan case, and the section of the Retailers' Occupation Tax act. In fact, counsel for the people in their brief admit that the Duncan case is in point, but argue that the decision in that case is wrong. Obviously this contention is without merit and cannot be entertained by this court. The judgment of the Municipal Court of Chicago is reversed.

JUDGMENT REVERSED.

Matchett, P. J., and Security, J., concur.

39053

HAROLD F. PAGE,
Appellee,

vs.

CHARLOTTE C. PAGE,
Appellant.

58
7
APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

287 I.A. 624³

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit for divorce July 22, 1931, charging that defendant deserted him "without any reasonable cause for the space of one year and upward and has persisted in such desertion to the present time." Defendant filed her answer, denying the charges and averred that plaintiff and defendant had cohabited as husband and wife as late as August, 1934. The case was heard before the court without a jury, there was a decree awarding plaintiff a divorce, and defendant appeals.

The record discloses that the parties were married August 25, 1928, separating October 13, 1928; that they again lived together July 18, 1931, for a period of four days, and plaintiff claims they have not lived together since July 22, 1931. On the other hand, defendant's position is that they lived together for short periods of time intermittently as late as August, 1934, which was six months before the filing of the bill.

Defendant contends that the finding of the court in plaintiff's favor is against the manifest weight of the evidence. Practically all of the material evidence is the testimony of plaintiff and defendant.

The evidence shows that defendant attended the University of Chicago from which she graduated in 1923. Her mother died when she was a small child and she was raised by her aunt, living with the aunt, the aunt's husband, and defendant's father; that she met plaintiff in 1923 while she was ^{still} attending the

HAROLD J. PAGE,
Appellee,

vs.

CHARLOTTE C. PAGE,
Appellant.

287 I.A. 624

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit for divorce July 23, 1931, charging that defendant deserted him "without any reasonable cause for the space of one year and upward and has persisted in such desertion to the present time." Defendant filed her answer, denying the charges and averred that plaintiff and defendant had cohabited as husband and wife as late as August, 1934. The case was heard before the court without a jury, there was a decree awarding plaintiff a divorce, and defendant appealed.

The record discloses that the parties were married August 28, 1926, separating October 13, 1928; that they again lived together July 18, 1931, for a period of four days, and plaintiff claims they have not lived together since July 23, 1931. On the other hand, defendant's position is that they lived together for a short period of time intermittently as late as August, 1934, which was six months before the filing of the bill.

Defendant contends that the finding of the court in plaintiff's favor is against the weight and value of the evidence. Practically all of the material evidence is the testimony of plaintiff and defendant.

The evidence shows that defendant attended the University of Chicago from which she graduated in 1925. Her mother died when she was a small child and she was reared by her aunt, living with the aunt, the aunt's husband, and defendant's father; that she met plaintiff in 1923 while she was attending the

University; that they kept company for about five years and were married August 25, 1928, at the aunt's home. From the time defendant graduated from the University she taught in the public schools of Chicago and was thus employed when married. The couple took a short honeymoon and returned to live with defendant's aunt.

Plaintiff testified that after they returned from their honeymoon to the aunt's home the aunt seemed to be much upset and to be sorry because of the marriage; that while they lived at the aunt's home the aunt would walk up and down in the hall, so that they had little sleep at night; "she was very much worried and was very sorry that my wife ever got married, and she was very jealous of me"; that on October 13, 1928, he told his wife they had better move, but she refused, and he went to the Y. M. C. A. and lived there about three months, and during that time saw his wife occasionally; that in March, 1929, he rented an apartment and tried to get his wife to come and live with him, but she refused; that he moved from the apartment and in January, 1930, went to Springfield, where he was transferred by his employer; that he filed a bill for divorce in Springfield; that shortly thereafter, in December, 1930, his wife came to Springfield to effect a reconciliation, returning to Chicago after a day or so, and he afterward dismissed the divorce suit; that she came to Springfield again in July, 1931, and they lived there together for four days, when she returned to Chicago. Upon her return she wrote him a letter, which is in the record, the substance of which was that she was finally separating from him and suggesting that he get a divorce. It seems that her aunt was in part the cause of the trouble. Plaintiff further testified that they had not lived together since July 22, 1931, but that he had seen defendant from time to time; that "At all times up until the bill for divorce was filed, I have been willing to make a home and

University; that they had company for about five years and were married August 28, 1921, at the aunt's home. From the time defendant transferred from the University and taught in the public schools of Chicago and was thus employed and married. The couple took a short honeymoon and returned to live with defendant's aunt. Plaintiff testified that after they returned from their honeymoon to the aunt's home the same seemed to be such a home and to be sorry because of the marriage; that while they lived at the aunt's home the aunt would walk up and down in the hall, so that they had little sleep at night; and was very much worried and was very sorry that my wife got married, and was very jealous of me; that on October 13, 1922, he told his wife they had better move, but she refused, and he went to the Y. M. C. A. and lived there about three months, and during that time saw his wife occasionally; that in March, 1923, he rented an apartment and tried to get his wife to come and live with him, but she refused; that he moved from the apartment and in January, 1924, went to Springfield, where he was transferred by his employer; that he filed a bill for divorce in Springfield; that shortly thereafter, in December, 1924, his wife came to Springfield to effect a reconciliation, returning to Chicago after a day or so, and he returned immediately the next day; that she came to Springfield again in July, 1925, and they lived there together for four days, when she returned to Chicago. Upon her return he wrote him a letter, which is in the record, the substance of which was that she was finally separating from him and suggesting that he get a divorce. It seems that her aunt was in part the cause of the trouble. Plaintiff testified that they had not lived together since July 23, 1925, but that he had seen defendant from time to time; that "it all came up until the bill for divorce was filed, I have been willing to make a home and

provide for her if she would come and live with me." On cross examination he testified that after he left his wife in October, 1928, he continued to see her and that they lived together as husband and wife off and on; that when they separated in October, 1928, his wife was teaching school and was endeavoring to secure a certain kind of teacher's certificate which required that she teach a year longer. He further testified that from the time they separated in 1928 he had not contributed anything toward her support except during the four days she lived with him at Springfield; that in January, 1932, he returned to Chicago and lived in Evanston; that his wife called on him there; that in the fall of 1932 he rented an apartment in Evanston and his mother came to live with him; that he did not ask his wife specifically to come and live with him; that she visited him there several times and had dinner with him and his mother; that they went out together on their birthdays to parties and theaters; went together to the World's Fair on several occasions in 1933; that he never allowed his wife to stay with him over night while he lived in Evanston although she wanted to do so; that the wife lived on the South Side of Chicago and would call on him at Evanston and he would drive her back home in his automobile; that during March, 1934, his wife was at his house several times and spent the day and evening. "Q. And she wanted to live there, didn't she? *** And you wouldn't permit her, but you did drive her home? A. She wouldn't come to live with me permanently and let her aunt go and come to live with me," - that he asked her to do so on a number of occasions. "Q. When did you ask her to come and live with you from 1933 to 1934? A. Every time, from 1933 on;" that in August, 1934, his mother was away and his wife came and spent the evening with him and they lived together on that occasion; that he saw his wife in September, 1934, and told her she had better get a divorce from him; that she told him she did not

provide for her if she would come and live with me." On cross examination he testified that after he left his wife in October, 1933, he continued to see her and that they lived together as husband and wife off and on; that when they separated in October, 1933, his wife was teaching school and was endeavoring to secure a certain kind of teacher's certificate which required that she teach a year longer. He further testified that from the time they separated in 1933 he had not contributed anything toward her support except during the four days she lived with him at Springfield; that in January, 1933, he returned to Chicago and lived in Evanston; that his wife called on him there; that in the Fall of 1933 he rented an apartment in Evanston and his mother came to live with him; that he did not ask his wife specifically to come and live with him; that she visited him there several times and had dinner with him and his mother; that they went out together on their first date to movies and theaters; went together to the World's Fair on several occasions in 1933; that he never allowed his wife to stay with him over night while he lived in Evanston although she wanted to do so; that the wife lived on the South Side of Chicago and would call on him at Evanston and he would drive her home in his automobile; that during March, 1934, his wife was at his home several times and spent the day and evening. "Q. And she wanted to live there, didn't she? *** And you wouldn't let her, did you? Did you drive her home? A. She wouldn't come to live with me permanently and let her want to and come to live with me." - That he asked her to do so on a number of occasions. "Q. When did you ask her to come and live with you from 1933 to 1934? A. Every time, from 1933 on." That in August, 1934, his mother came away and his wife came and spent the evening with him and they lived together on that occasion; that he saw his wife in September, 1934, and told her she had better get a divorce from him; that she told him she did not

want a divorce; that she wanted to start over again but would not leave her aunt; that she would not live with him in Evanston or any other place that he suggested. "Q. Did you ask her to come? A. No, I did not." He produced a letter dated February 1, 1935, from his wife in which she said that a divorce was very distasteful to her and that she still wanted to live with him, and that she had not deserted him, - "for I would be only too glad to start house-keeping again and live with you any place you say." That on February 9, ten days before the divorce suit was filed, they met with their attorneys and talked the matter over. On redirect examination he testified that during the time they were separated and until July, 1931, they lived together at different times as husband and wife, and that he was willing at all times to make a home for her and live with her, until he filed the complaint in the instant case, but she refused to leave her aunt and live with him.

Defendant testified that she was 34 years old, born and educated in Chicago, and graduated from the University of Chicago in 1923 with the degree of Bachelor of Science; that she met plaintiff before she graduated and they kept company until they were married five years later; that after they had lived with her aunt (at whose home they were married) for about two months he left, and she supposed he would have furnished a home for her, but she wanted to stay and finish her teaching so she could get her teacher's certificate, which would take at least a year more, and that plaintiff was satisfied and she continued to teach until she got the certificate in 1931; that when she left him in 1931 at Springfield, where they had lived together for four days, and returned to Chicago, she telephoned him that night and told him her aunt had been bothering her, and that he then came to Chicago where, apparently, the matter of her leaving Springfield was fully explained; that they lived together as husband and wife intermittently until August, 1934, although he would not permit her to stay overnight at his

want a divorce; that she wanted to start over again but would not
leave her son; that she would not live with him in Evanston or
any other place that he suggested. "I did not see her or know
A. E. I did not." He received a letter dated January 1, 1931,
from his wife in which she said a divorce was very desirable
to her and that she still wanted to live with him, and that she had
not deserted him, - "for I would be only too glad to start house-
keeping again and live with you any place you say." Last on February
9, ten days before the divorce suit was filed, they met with their
attorneys and talked the matter over. On request explanation he
testified that during the time they were separated and until July,
1931, they lived together at different times as husband and wife,
and that he was willing at all times to come home for her and live
with her, until he filed the complaint in the instant case, but she
refused to leave her son and live with him.

Defendant testified that she was 34 years old, born and
educated in Chicago, and returned from the University of Chicago
in 1923 with the degree of Bachelor of Science; that she met
plaintiff before she graduated and they went to college until they
were married five years later; that after they had lived with her
son (at some time they were married) for about two months he left,
and she supposed he would have returned some time later, but she
wanted to stay and finish her teaching so she could get her teacher's
certificate, which would take at least a year more, and that plain-
tiff was satisfied and she continued to teach until one of the
certificates in 1931; that when she left him in 1931 at Springfield,
where they had lived together for two days, and returned to Chicago,
she telephoned him that night and told him her son had been marry-
ing her, and that he then came to Chicago where, according to the
matter of her leaving Springfield was fully explained; that they
lived together as husband and wife until defendant really wanted

Evanston home; that the last time she lived with him as his wife was in August, 1934; that they went out together several times to dinner, theatres, and the World's Fair, and that she often visited him; that she was willing to return and live with him from 1932 on, and was still willing to do so; that her aunt seemed to be jealous of both plaintiff and defendant; that she never told him she would not live with him while her aunt was alive, but on the contrary offered to live with him in his home and would leave her aunt; that this was in 1933. Both parties gave testimony to the effect that plaintiff was somewhat impotent.

This is substantially all the material evidence in the record, and we think it falls far short of showing that defendant was guilty of wilfully deserting plaintiff, as found in the decree. We think the evidence shows that plaintiff's aunt was, at the beginning, a cause of the separation, but that it was agreed between the parties that defendant would continue to teach for another year to obtain her certificate and live at the aunt's home during that time.

Counsel for plaintiff argues in his brief that the desertion upon which plaintiff relies occurred July 22, 1931, when defendant left him at Springfield, and that this desertion continued for more than one year, which is all the statute requires, and that there was no offer on the part of defendant to return to plaintiff within the year following July, 1931, and any offer made by her after the expiration of that year was unavailing. We have referred at considerable length to the testimony of the two parties and we think it shows that after July, 1931, and in fact since their marriage in 1928 and until August, 1934, neither of the parties thought they were permanently separated. Plaintiff testified that on numerous occasions, until 1933 and 1934, he asked her to come and live with him, and defendant testified she was willing to live with him up to and at the time of the hearing.

Kavanston home; that the last time she lived with him as his wife
 was in August, 1934; that they went out together several times to
 dinner, theaters, and the World's Fair, and that one of her visits
 him; that she was willing to return and live with him from 1933 on,
 and was still willing to do so; that her name seemed to be jealous
 of both Plaintiff and Defendant; that she never told him she would
 not live with him while her name was alive, but on the contrary
 offered to live with him in his home and would leave her name; that
 this was in 1933. Both parties were testifying to the effect that
 Plaintiff was somewhat imposter.
 This is substantially all the material evidence in the rec-
 ord, and we think it falls far short of showing that Defendant was
 guilty of wilfully deserting Plaintiff, as found in the decree. We
 think the evidence shows that Plaintiff's name was, at the beginning,
 a cause of the separation, but that it was agreed between the parties
 that Defendant would continue to teach and would not try to obtain
 her certificate and live at the same time.
 Counsel for Plaintiff agrees in his brief that the description
 upon which Plaintiff relies occurred July 21, 1931, when Defendant
 left him at Springfield, and that this separation continued for more
 than one year, which is all the statute requires, and that there
 was no offer on the part of Defendant to return to Plaintiff within
 the year following July 21, 1931, and any offer made by her after the
 expiration of that year was unavailable. We have reviewed the consid-
 erable evidence to the testimony of the two parties and we think it shows
 that after July 21, 1931, and in fact since their marriage in 1928 and
 until August, 1934, neither of the parties thought they were perma-
 nently separated. Plaintiff testified that on several occasions,
 until 1933 and 1934, he asked her to come and live with him, and that
 Defendant testified she was willing to live with him up to and at the
 time of the hearing.

We think the finding of the Chancellor is against the manifest weight of the evidence, and the decree of the Circuit court of Cook county is therefore reversed and the cause remanded with directions to dismiss the bill.

REVERSED AND REMANDED WITH DIRECTIONS.

Matchett, P. J., and McSurely, J., concur.

the time the finding of the coroner is against the
marriage of the deceased, and the burden of the proof
is on the party who claims that the deceased was
married at the time of his death.

REVEREND AND HONORABLE MEN, JUDGES OF THE COURT

Worcester, P. J., and McLaughlin, J., counsel.

39090

THE MUTUAL LIFE INSURANCE COMPANY
OF NEW YORK, a Corporation,

vs.

MARY KIRBY BAILEY, as Administratrix
of the Estate of William J. Bailey,
Deceased, and MARGARET GINLEY.

MARY KIRBY BAILEY, as Adm'x., etc.,
Appellant.

MARGARET GINLEY,

Appellee.

APPEAL FROM CIRCUIT

COURT OF COOK COUNTY.

287 I.A. 624⁴

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

The Mutual Life Insurance Company filed its bill of interpleader setting up that it had \$4891.41 in its possession, being the proceeds of a life insurance policy issued to William J. Bailey, and that the money was claimed by each of the two defendants. Each defendant filed her answer setting up her respective claim to the funds, and the cause was referred to a Master in Chancery. He took the evidence and made up his report, found that Mary Ginley had lent money to William J. Bailey in his lifetime and that Bailey had assigned the life insurance policy to her as security for the money lent; that the amount due and owing to Mary Ginley from the insured was \$5270.01; and recommended a decree be entered awarding the money to Mrs. Ginley. The court sustained some of the exceptions to the report after holding that some of the evidence introduced before the master was inadmissible. The decree found there was \$4547.50 due and owing to Mrs. Ginley for money she had lent Bailey in his lifetime and for which he assigned to her the insurance policy as security. She was awarded this amount, and the balance of the insurance money, amounting to \$391.79 was decreed to Mary K. Bailey as administratrix of the

THE MUTUAL LIFE INSURANCE COMPANY
OF NEW YORK, a Corporation,

vs.

MARY KIRBY BALLEW, as Administratrix
of the Estate of William J. Ballew,
Deceased, and MARGARET GINLEY.

MARY KIRBY BALLEW, as Admin'x., etc.,
Appellant.

MARGARET GINLEY,

Appellee.

APPEAL FROM DECREE

COURT OF COMMON PLEAS

287 I.A. 624

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

The Mutual Life Insurance Company filed its bill of interpleader setting up that it had \$4591.41 in its possession, being the proceeds of a life insurance policy issued to William J. Ballew, and that the money was claimed by each of the two defendants. Each defendant filed her answer setting up her respective claim to the funds, and the cause was referred to a master in Chancery. He took the evidence and made up his report, finding that Mary Ginley had lent money to William J. Ballew at the time and that Ballew had assigned the life insurance policy to her as security for the money lent; that the amount was and owing to Mary Ginley from the insured was \$5270.01; and recommended a decree be entered awarding the money to Mrs. Ginley. The court sustained some of the exceptions to the report after holding that some of the evidence introduced before the master was inadmissible. The decree found there was \$4547.50 due and owing to Mrs. Ginley for money she had lent Ballew in his lifetime and for which he assigned to her the insurance policy as security. She was awarded this amount, and the balance of the insurance money, according to \$391.79 was decreed to Mary J. Ballew as administratrix of the

estate of William J. Bailey, deceased. The administratrix, being dissatisfied, prosecutes this appeal.

The record discloses that on September 29, 1929, the Mutual Life Insurance Company of New York, issued its policy on the life of William J. Bailey for \$2500. The policy contained a double indemnity provision in case the insured died as the result of an accident. The beneficiary named in the policy was the "executors, administrators or assigns" of the insured's estate. October 29, 1929, one month after the policy was issued, Bailey, the insured, assigned the policy to Mrs. Ginley; the Insurance company was notified, and it accepted the assignment.

It being admitted that the policy was assigned to Mrs. Ginley to secure payment of the money she had lent to Bailey in his lifetime, obviously she could recover only the amount due and owing to her. This is also conceded by both parties.

But the administratrix contends that the assignment of the policy secured only the loans made prior to the date of the assignment, and that under the law such an assignment "cannot be extended to cover a loan made after the assignment has been given without obtaining a further assignment unless it was clearly the intention of the parties that the assignment should cover future loans." The administratrix further contends that the burden was on Mrs. Ginley to prove the amount of money she had lent the insured, Bailey. We think this is a correct statement of the law.

The master found that in assigning the policy to Mrs. Ginley, it was the intention of the insured to secure to her repayment of money lent by her to him prior to and subsequent to the date of the execution of the assignment. And by the decree of the Chancellor there was a finding to the same effect. The Chancellor found that the exact amount advanced by Mrs. Ginley to the insured

estate of William J. Bailey, deceased. The administrator, being dissatisfied, prosecutes this appeal.

The record discloses that on September 26, 1929, the Mutual Life Insurance Company of New York, issued its policy on the life of William J. Bailey for \$250,000. The policy contained a double indemnity provision in case the insured died as the result of an accident. The beneficiary named in the policy was the "executors, administrators or assigns" of the insured's estate. October 20, 1929, one month after the policy was issued, Bailey, the insured, assigned the policy to Mrs. Gineley; the insurance company was notified, and it accepted the assignment.

It being admitted that the policy was assigned to Mrs. Gineley to secure payment of the money and not lent to her in his lifetime, obviously she could recover only the amount due and owing to her. This is also conceded by both parties.

But the administrator contends that the assignment of the policy secured only the loan made prior to the date of the assignment, and that under the law such an assignment "cannot be extended to cover a loan made after the assignment has been given without obtaining a further assignment unless it was merely the intention of the parties that the assignment should cover future loans."

The administrator further contends that the burden was on Mrs. Gineley to prove the amount of money she had lent the insured, Bailey. We think this is a correct statement of the law.

The master found that in assigning the policy to Mrs. Gineley, it was the intention of the insured to secure for her the present of money lent by her to him prior to and subsequent to the date of the execution of the assignment. And by the terms of the Chancellor there was a finding to the same effect. The Chancellor found that the exact amount advanced by Mrs. Bailey to the insured

before the assignment could not be determined from the evidence; that after the assignment she lent the insured other sums; that the total amount of moneys lent was \$3632, as evidenced by a promissory note dated March 25, 1932, executed by Bailey and delivered to Mrs. Ginley.

Counsel for the administratrix contend that the evidence does not sustain the findings above mentioned; that the testimony of Mrs. Ginley, which was heard by the master, was later stricken by the Chancellor because she was incompetent to testify, under the statute, the controversy being between her and the administratrix, and that the only evidence remaining in the record was the testimony of witnesses Hintzpeter and Wainwright.

Hintzpeter testified that he was an insurance agent and wrote the policy in question in September, 1929; that he did not know Bailey, the insured, prior to the time the policy was written; that in October, 1929, Bailey told him he owed Mrs. Ginley some money and wished to guarantee that she would be repaid by assigning the policy to her; that the witness then prepared the assignment which was afterward executed by the insured and accepted by Mrs. Ginley. The witness further testified that he asked Bailey "how much he owed her. The amount I cannot recall. He did say, however, that this woman had advanced to him monies from time to time and this was the only possible way that he at that time could see to guarantee her repayment. *** He said also that he also wished to create confidence in this individual inasmuch as he considered her a source of credit."

Wainwright, called by Mrs. Ginley, testified that he was employed by the Lafayette Coal Company. (It appears that at the time in question both Bailey and Mrs. Ginley worked for that company.) The witness then identified the note executed by Bailey to Mrs. Ginley, and testified that he saw the note at the time it

before the assignment could not be determined from the evidence; that after the assignment was made the insured's name; that the total amount of money lent was \$1000, as evidenced by a promissory note dated March 25, 1929, executed by Bailey and delivered to Mrs. Dimley.

Counsel for the administratrix contended that the evidence does not sustain the findings above mentioned; that the testimony of Mrs. Dimley, which was heard by the master, was later stricken by the Chancellor because she was incompetent to testify, under the statute, the controversy being between her and the administratrix, and that the only evidence remaining in the record was the testimony of witnesses Hightower and Wainwright.

Hightower testified that he was an insurance agent and wrote the policy in question in October, 1929; that he did not know Bailey, the insured, prior to the time the policy was written; that in October, 1929, Bailey told him he owed Mrs. Dimley some money and wished to guarantee that she would be repaid by assigning the policy to her; that the witness then prepared the assignment which was afterward executed by the insured and accepted by Mrs. Dimley. The witness further testified that he asked Bailey "how much he owed her. The amount I cannot recall. He did say, however, that this woman had advanced to him some \$1000 from time to time and this was the only possible way that he at that time could see to guarantee her repayment. He said also that he also wished to create confidence in this individual insurance agent as he considered her a source of credit."

Wainwright, called by Mrs. Dimley, testified that he was employed by the Lafayette Coal Company. (It appears that at the time in question both Bailey and Mrs. Dimley worked for that company.) The witness then identified the note executed by Bailey to Mrs. Dimley, and testified that he saw the note at the time it

was made; that he saw Bailey sign it; that at that time the witness said the note was for a considerable sum of money, to which Bailey replied, "Yes, it is, but you know yourself that at various times I have gotten money from Margaret."

Sometime after the assignment the policy was delivered to Mrs. Ginley and was retained by her. Counsel for the administratrix argues that it was unreasonable to believe that Mrs. Ginley would accept the assignment of the policy, which was for but \$2500, to secure the payment of monies advanced by her to the insured amounting to \$3632, as evidenced by his note, for the reason that although the policy contained a double indemnity clause, it could not reasonably be supposed that Bailey and Mrs. Ginley contemplated that he might be accidentally killed, as was the case, his death occurring July 15, 1934.

There is no contention but that the note is genuine, and there is no evidence that Bailey could secure the payment of the money he was borrowing from Mrs. Ginley in any other way than by assignment of the policy. The evidence shows that prior to the assignment she had lent him sums of money, the exact amount of which is not shown by the evidence.

Upon a careful consideration of all the evidence in the record, we are unable to say that the finding of the Master, which was sustained by the Chancellor (to the effect that the assignment was to secure the repayment to Mrs. Ginley of the money she had advanced to Bailey prior to and subsequent to the assignment) is not warranted by the evidence.

The decree of the Circuit court of Cook county is affirmed.

DECREE AFFIRMED.

Matchett, P. J. and McSurely, J., concur.

was made; that he saw Bailey sign it; that at that time and place
 near said the note was for a considerable sum of money, to which
 Bailey replied, "Yes, it is, but you may yourself find it
 various times I have gotten money from Margaret."

Sometime after the assignment the policy was delivered
 to Mrs. Giney and was retained by her. Counsel for the plaintiff
 argues that it was unreasonable to believe that Mrs. Giney
 would accept the assignment of the policy, which was for but \$200,
 to secure the payment of monies advanced by her to the insured
 amounting to \$3000, as evidenced by his note, for the reason that
 although the policy contained a double indemnity clause, it could
 not reasonably be supposed that Bailey and Mrs. Giney contemplated
 that he might be accidentally killed, as was the case, his death
 occurring July 15, 1934.

There is no contention but that the note is genuine, and
 there is no evidence that Bailey could secure the payment of the
 money he was borrowing from Mrs. Giney in any other way than by
 assignment of the policy. The evidence shows that prior to the
 assignment she had lent him sums of money, the exact amount of
 which is not shown by the evidence.

Upon a careful consideration of all the evidence in the
 record, we are unable to say that the finding of the master, which
 was sustained by the Chancellor (to the effect that the assignment
 was to secure the repayment to Mrs. Giney of the money she had
 advanced to Bailey prior to and subsequent to the assignment) is
 not warranted by the evidence.

The decree of the Circuit Court of Cook County is affirmed.

WALTER J. J. and MARY J. J., counsel.

38930

PEOPLE OF THE STATE OF ILLINOIS,
ex rel., JOHN S. RUSCH,

(Petitioner) Defendant in Error,

v.

ANNA TWOHIG, RALPH D. MEFFORD and
MARIE KEELEY,

(Respondents) Plaintiffs in Error.

ERROR TO

COUNTY COURT

COOK COUNTY.

287 I.A. 6251

MR. JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT.

This cause is in this court upon a writ of error instituted by Anna Twohig, Ralph D. Mefford and Marie Keeley, defendants, to have reviewed the record of the County Court of Cook County, wherein they were found guilty of contempt as officers of the court, by the Honorable Edmund K. Jarecki, judge presiding, because of their misbehavior and misconduct in office as election officials while acting as judges of election and members of the Board of Registry in the 40th Precinct in the 29th Ward in the City of Chicago.

It appears from the record that on the 7th day of April, 1935, a verified petition was filed in the County Court of Cook County in the name of the People of the State of Illinois on the relation of John S. Rusch, Chief Clerk of the Board of Election Commissioners of the City of Chicago, alleging that on the 17th day of March, 1936, a registration of the electors residing in the City of Chicago was had in the 40th Precinct in the 29th Ward in the City of Chicago, for the primary election to be held on the 14th day of April, 1936, in the City of Chicago.

It was alleged that the respondents while acting as members of the Board of Registry, wilfully, fraudulently and unlawfully permitted and acquiesced in permitting names to be placed upon the two registry books furnished to them by the Board of Election Commissioners.

It was further alleged that each of the respondents wilfully, fraudulently and unlawfully permitted and acquiesced in permitting

PEOPLE OF THE STATE OF ILLINOIS,
 ex rel., JOHN S. RASCH,

(Petitioner) Defendant in Error,

v.

ANNA TOWHIG, RALPH W. WATFORD and
 MARIE KESEY,

(Respondents) Plaintiffs in Error.

287 I.A. 625

COOK COUNTY,
 COOK COUNTY,
 COOK COUNTY.

MR. JUSTICE HARRIS DELIVERED THE OPINION OF THE COURT.

This cause is in this court upon a writ of error instituted by Anna Towhig, Ralph W. Watford and Marie Kesley, defendants, to have reviewed the record of the County Court of Cook County, wherein they were found guilty of contempt in officers of the court, by the Honorable Edmund A. Jurecki, Judge presiding, because of their misbehavior and misconduct in office as election officials while acting as judges of election and members of the board of registry in the 40th Precinct in the 38th ward in the City of Chicago. It appears from the record that on the 7th day of April, 1935, a verified petition was filed in the County Court of Cook County in the name of the People of the State of Illinois on the petition of John S. Rasch, Chief Clerk of the Board of Election Commissioners of the City of Chicago, alleging that on the 17th day of March, 1935, registration of the electors residing in the City of Chicago was had in the 40th Precinct in the 38th ward in the City of Chicago, for the primary election to be held on the 17th day of April, 1935, in the City of Chicago.

It was alleged that the respondents while acting as members of the board of registry, illegally, fraudulently and unlawfully permitted and acquiesced in permitting names to be placed upon the two registry books furnished to them by the Board of Election Commissioners. It was further alleged that none of the respondents actually transmitted and unlawfully resisted and acquiesced in permitting

names of individuals to be placed upon the two registry books, and each of them knowingly and corruptly placed the names and history of the individuals upon the registry books without the individuals being personally present and being under oath by the respondents constituting the Board of Registry.

On April 7, 1936, an order was entered granting leave to file the petition and ordering that the defendants, and each of them, show cause, and that they appear to answer said charges.

On April 16, 1936, the respondents filed a joint verified answer in which they denied the allegations of the petition.

Thereafter upon a hearing, the defendants were each found guilty in the County Court of Cook County of misbehavior and misconduct in office as election officials, and each of them was sentenced for contempt of court for a period of six months.

This court in passing upon the question of the right of the defendants to appear in this court upon a writ of error will adhere to what we said in an opinion filed in case No. 38847. We there said:

"The Supreme Court of this state, in the cases of People v. Kotwas, 363 Ill. 336, People v. Ford, 363 Ill. 340, People v. Benjamin, 363 Ill. 344, and recently in the case of People v. Brown, 364 Ill. 273, has held that a judgment of the character of the judgment in this case, cannot be reviewed by writ of error, but that appeal is the proper procedure. The writ of error is, therefore, dismissed."

WRIT DISMISSED.

DENIS E. SULLIVAN, P.J. AND HALL, J. CONCUR.

names of individuals to be placed upon the two registry books, and each of them knowingly and corruptly placed the names and history of the individuals upon the registry books without the individuals being personally present and being under oath by the respondents constituting the Board of Registry.

On April 7, 1936, an order was entered granting leave to file the petition and ordering that the defendants, and each of them, show cause, and that they appear in court and obey the

On April 16, 1936, the respondents filed a joint verified answer in which they denied the allegations of the petition.

Thereafter upon a hearing, the defendants were each found

guilty in the County Court of Cook County of misdemeanor and misconduct in office as election officials, and each of them was sentenced for contempt of court for a period of six months.

This court in passing upon the petition of the respondents

the defendants to appear in this court upon a writ of error will adhere to what we said in an opinion filed in case No. 10,000, we

there said:

"The Supreme Court of this state, in the case of People v. Lewis, 323 Ill. 526, 163 Ill. 340, People v. Lewis, 323 Ill. 526, 163 Ill. 340, People v. Lewis, 323 Ill. 526, 163 Ill. 340, and said that a judgment of the character of the judgment in this case cannot be reviewed by writ of error, but that review is the proper procedure. The writ of error is, therefore, dismissed."

THIS DISMISSED.

WILLIAM E. KELLER, P. J. AND CLERK, J. KELLER.

38945

PEOPLE OF THE STATE OF ILLINOIS
ex rel. JOHN S. RUSCH,
Defendant in Error,

vs.

VIOLA R. WOJCIK and MERCEDES S.
TUTTLE,
Plaintiffs in Error.

ERROR TO COUNTY COURT
OF COOK COUNTY.

287 I.A. 625²

PER CURIAM OPINION.

A petition was filed in the County court of Cook county in which it was charged that Emily Thompson, Bonnie Horton, Viola R. Wojcik, John H. Dona and Mercedes E. Tuttle, judges and clerks of election, were guilty of misconduct and misbehavior as such judges and clerks of election in the 48th precinct of the 27th ward in the city of Chicago at a primary election held in Chicago, Cook county, Illinois, on April 10, 1934, and were therefore guilty of contempt of the County court.

After a hearing Viola R. Wojcik and Mercedes E. Tuttle were found guilty as charged, and it was ordered that each of the respondents be incarcerated in the jail of Cook county for a period of one year from the date of commitment, or until sooner discharged in due course of law; these respondents have issued out a writ of error from this court and are seeking a reversal.

The Supreme court in the cases of People v. Kotwas, 363 Ill. 336, People v. Ford, 363 Ill. 340, People v. Benjamin, 363 Ill. 344, and People v. Brown, 364 Ill. 273, and this court in People ex rel. Rusch v. Kirgis et al., No. 38847, and People ex rel Rusch v. Twohig et al., No. 38930, opinions filed November 30, 1936, have held that a judgment of this character cannot be reviewed by writ of error and that appeal is the proper procedure. The writ of error is therefore dismissed.

WRIT OF ERROR DISMISSED.

PEOPLE OF THE STATE OF ILLINOIS

ex rel. JAMES R. MURPHY,

Defendant in error,

vs.

VIOLETTA R. WOJCIK and MARCEDES S.

TUTTLE,

Plaintiffs in error.

PER CURIAM OPINION.

A petition was filed in the County Court of Cook County in which it was charged that Emily Thompson, Bonnie Burton, Clara R. Wojcik, John M. Dora and Mercedes S. Tuttle, Judges and clerks of election, were guilty of misconduct and misbehavior as such Judges and clerks of election in the 48th precinct of the 27th ward in the city of Chicago at a primary election held in Chicago, Cook County, Illinois, on April 10, 1934, and were therefore guilty of contempt of the County court.

After a hearing Violetta R. Wojcik and Mercedes S. Tuttle were found guilty as charged, and it was ordered that each of the respondents be incarcerated in the Jail of Cook County for a period of one year from the date of commitment, or until such time as they in due course of law; these respondents have each out a writ of error from this court and are seeking a reversal.

The Supreme Court in the case of People v. Brown, 363 Ill. 336, People v. Ford, 363 Ill. 340, People v. Johnson, 363 Ill. 344, and People v. Brown, 364 Ill. 375, and this court in People ex rel. French v. Kittles et al., No. 38847, and People ex rel. French v. Twohig et al., No. 38930, opinions filed November 20, 1935, have held that a judgment of this character cannot be reviewed by writ of error and that appeal is the proper procedure. The writ of error is therefore dismissed.

WRIT OF ERROR DENIED.

287 I.A. 625

ON COURT REPORT.

THOMAS R. GILBERT, CLERK.

38928

MICHAEL J. O'MALLEY,

Appellant,

v.

CHARLES J. O'MALLEY, (Impleaded),

Appellee.

70
APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

287 I.A. 625³

MR. PRESIDING JUSTICE DENIS E. SULLIVAN DELIVERED THE OPINION OF
THE COURT.

This is an appeal from a decree of the Circuit Court dismissing plaintiff's bill of complaint for want of equity. The facts disclosed by the bill, the answer and the evidence are as follows:

Since about the year 1907, the plaintiff, Michael J. O'Malley, has been the president and principal stockholder of the Standard Asbestos Manufacturing Company, an Illinois corporation, and, at the time of the transaction in question, was the head of a family consisting of his wife and seven children, five sons and two daughters, including the defendant, Charles J. O'Malley.

The defendant Charles J. O'Malley, was ordained a priest on June 12, 1921, and shortly after his ordination, he received an appointment as assistant pastor in Carroll, Iowa. He remained there until about September 15th of that year, when he went to Bancroft, Iowa, and served there until February, 1922. He then went to Vail, Iowa, where he was taken ill, but he remained there until November, 1923.

On November 10, 1922, Michael O'Malley, the father of the defendant, caused to be issued to his son Charles J. O'Malley, a certificate of stock for 75 shares of the Standard Asbestos Manufacturing Company, the ownership of which shares of stock is the question before us for decision.

MICHAEL J. O'MALLEY,

Appellant,

v.

CHARLES J. O'MALLEY, (Impleaded),

Appellee.

CIRCUIT COURT,

COOK COUNTY,

287 I.A. 625

MR. PRESIDING JUSTICE DENIS E. SHULLMAN DELIVERED THE DECISION OF THE COURT.

This is an appeal from a decree of the Circuit Court dismissing plaintiff's bill of complaint for want of equity. The facts disclosed by the bill, the answer and the evidence are as follows:

Since about the year 1907, the plaintiff, Michael J. O'Malley, has been the president and principal stockholder of the Standard Asbestos Manufacturing Company, an Illinois corporation, and, at the time of the transaction in question, was the head of a family consisting of his wife and seven children, five sons and two daughters, including the defendant, Charles J. O'Malley. The defendant Charles J. O'Malley, was obtained a great on June 12, 1931, and shortly after his ordination, he received an appointment as assistant pastor in Carroll, Iowa. He remained there until about September 12th of that year, when he went to Bancroft, Iowa, and served there until February, 1932. He then went to Vail, Iowa, where he was taken ill, but he remained there until November, 1932.

On November 10, 1932, Michael O'Malley, the father of the defendant, caused to be issued to his son Charles J. O'Malley, a certificate of stock for 75 shares of the Standard Asbestos Manufacturing Company, the ownership of which shares of stock is the question before us for decision.

The son claims that this certificate was made out to him by his father as an outright gift. The father claims that the certificate was issued to his son in name only for convenience and was not intended as a gift.

After defendant left Vail, Iowa, he went to Boone, Iowa, where he remained until December, 1924. In the foregoing appointments, the defendant served as an assistant pastor. About December, 1924, the defendant was appointed as a pastor at Manning, Iowa. This was his first pastorate. He remained there until October, 1928, when he left on account of illness and came to Chicago. He remained in Chicago until early in 1929, when he went to California and he remained there until October of that year. After that time he went to live with one Father Code in Chicago, whom he assisted until Father Code died in October, 1932. After the defendant left his parish at Manning, Iowa, he no longer received any compensation from his parish nor was he earning any money. During that period he received \$200.00 a month from the Standard Asbestos Manufacturing Company which was sent to him by his father. In the spring of 1930, the defendant's father discontinued sending his son any further remittances.

Plaintiff's theory of the case is that he never parted with title to the stock and that he never intended it as a gift to his son and that no gift was made.

Defendant's theory is that the plaintiff, his father, intended to and did make him a gift of the 75 shares of stock.

Defendant contends that there was a complete gift of the shares of stock in 1922 and that the stock certificates were made out and delivered to him and that he, the defendant, had them placed in the safety deposit box of the company for safe-keeping, and that no question was raised concerning the same until some 8 or 10 years later and that during all that time the defendant had received the

The son claims that this certificate was made out to him by his father as an outright gift. The father claims that the certificate was issued to his son in name only for convenience and was not intended as a gift.

After defendant left Vail, Iowa, he went to Boone, Iowa, where he remained until December, 1934. In the foregoing circumstances, the defendant served as an assistant pastor. About December, 1934, the defendant was appointed as a pastor at Manning, Iowa. This was his first pastorate. He remained there until October, 1938, when he left on account of illness and came to Chicago. He remained in Chicago until early in 1939, when he went to California and he remained there until October of that year. After that time he went to live with one Father Gode in Chicago, whom he assisted until Father Gode died in October, 1939. After the defendant left his parish at Manning, Iowa, he no longer received any compensation from his parish nor was he earning any money. During that period he received \$100.00 a month from the Standard Life Insurance Company which was sent to him by his father. In the spring of 1940, the defendant's father discontinued sending his son any further remittances.

Plaintiff's theory of the case is that he never parted with title to the stock and that he never intended it as a gift to his son and that no gift was made.

Defendant's theory is that the plaintiff, his father, intended to and did make him a gift of the 75 shares of stock.

Defendant contends that there was a complete gift of the shares of stock in 1933 and that the stock certificates were made out and delivered to him and that he, the defendant, had then placed in the safety deposit box of the company for safe-keeping, and that no question was raised concerning the same until some 8 or 10 years later and that during all that time the defendant had received the

income from said stock.

According to the testimony of the plaintiff there had been no mention of the stock certificate from the date of its issuance until the summer of 1928, when he asked his son to return the stock.

According to the testimony of the defendant, there was no mention of the stock between November, 1922 and the fall of 1930, except on the occasion when the son took sick while at Manning, Iowa, when the plaintiff persuaded his son to resign his parish and come home to Chicago. At this time the defendant told his father that he could not resign because it was a question of his living and if he resigned, he would be without a living. Defendant testified his father said:

"I don't know what you are worrying about, you own seventy-five shares of stock, your living is assured."

On December 2, 1930, the plaintiff wrote to the defendant requesting him to return the stock and endorse the stock certificate back to him.

The evidence shows that about this time the plaintiff was having domestic difficulty with his wife, defendant's mother, and it is quite apparent that this difficulty caused the plaintiff to desire to have the stock returned to him. In the controversy between his father and his mother, the defendant championed his mother's cause.

The evidence further shows that about this time, at plaintiff's request, a conference was held in the office of Mr. Heffernan, plaintiff's attorney, and Mr. Heffernan asked the defendant if he would give back the stock; that Heffernan also stated that the question of the stock and the mother's lawsuit were going to be made one issue; that defendant refused to return the stock; that when they were leaving Heffernan's office the lawyer asked the defendant again if he would return the stock, but that defendant replied, "No". During the conference in Heffernan's office the latter said to the defendant,

income from said stock.

According to the testimony of the Plaintiff there had been

no mention of the stock certificate from the date of its issuance

until the summer of 1938, when he asked his son to return the stock.

According to the testimony of the defendant, there was no

mention of the stock between November, 1937 and the fall of 1939,

except on the occasion when the son took sick while at Manning, Iowa,

when the Plaintiff persuaded his son to resign his position and come

home to Chicago. At this time the defendant told his father that he

could not resign because it was a question of his living and if he

resigned, he would be without a living. Defendant testified his

father said:

"I don't know what you are worrying about, you own seventy-five shares of stock, your living is assured."

On December 2, 1939, the Plaintiff wrote to the defendant

requesting him to return the stock and endorse the stock certificate

back to him.

The evidence shows that about this time the Plaintiff was

having domestic difficulty with his wife, defendant's mother, and it

is quite apparent that this difficulty caused the Plaintiff to desire

to have the stock returned to him. In the controversy between his

father and his mother, the defendant championed his mother's cause.

The evidence further shows that about this time, at Plaintiff's

request, a conference was held in the office of Mr. Haffner, Plaintiff's

attorney, and Mr. Haffner asked the defendant if he would

give back the stock; that Haffner also stated that the question of

the stock and the mother's lawsuit were going to be made one issue;

that defendant refused to return the stock; that when they were leaving

Haffner's office the lawyer asked the defendant again if he would

return the stock, but that defendant replied, "No". During the

conference in Haffner's office the latter said to the defendant,

"You own 75 shares of stock. Your other brothers have none."

At the hearing before the master the plaintiff testified that the certificate was made out on the date it bears in Mr. Heffernan's office in November, 1922, and was for the convenience of the Reverend Charles J. O'Malley, his son; that the defendant O'Malley was to use the income from that certificate; that defendant told plaintiff his expenses, if he got an appointment out of his diocese, would probably be two or three hundred dollars a month and that therefore the income from that certificate of stock, which was always kept in plaintiff's possession, would take care of him; the defendant; that it was the defendant who first brought up the subject of stock and that plaintiff told defendant that he would never consent to give him any stock, but would give it to him for convenience only.

Plaintiff further testified that after the ordination of his son Charles, which occurred in 1921, the defendant asked him if he wouldn't put away some stock for him, so that if he got an appointment he would be backed up; that he told defendant that he could not see his way clear at that time to do anything because it would not be fair to the other children; that he finally agreed to put some away and took defendant over to Mr. Heffernan's office on November 10, 1922; that if he got an appointment we would have to put away something for a guaranty for him; that this took place in Mr. Heffernan's office and the certificate was prepared and he, plaintiff, signed it.

With regard to the stock transfer the son, defendant herein, testified that the first talk between his father and himself transpired about a month prior to the issuance of the certificate; that his father told him he wanted to make him a stockholder in the corporation and would take steps to carry that out; that his father

"You own 75 shares of stock. Your other brothers have none."

At the hearing before the master the plaintiff testified

that the certificate was made out on the date it bears in Mr.

Helferman's office in November, 1923, and was for the convenience

of the Reverend Charles J. O'Malley, his son; that the defendant

O'Malley was to use the income from that certificate; that defendant

told plaintiff his expenses, if he got an appointment out of his

diocese, would probably be two or three hundred dollars a month

and that therefore the income from that certificate of stock, which

was always kept in plaintiff's possession, would take care of him,

the defendant; that it was the defendant who first brought up the

subject of stock and that plaintiff told defendant that he would

never consent to give him any stock, but would give it to him for

convenience only.

Plaintiff further testified that after the execution of

his son Charles, which occurred in 1921, the defendant asked him if

he wouldn't put away some stock for him, so that if he got an

appointment he would be backed up; that he told defendant that he

could not see his way clear at that time to do anything because it

would not be fair to the other children; that he finally agreed to

put some away and took defendant over to Mr. Helferman's office on

November 10, 1923; that if he got an appointment he would have to

put away something for a guaranty for him; that this took place in

Mr. Helferman's office and the certificate was executed and he,

plaintiff, signed it.

With regard to the stock transfer the son, defendant herein

testified that the first talk between his father and himself

transpired about a month prior to the issuance of the certificate;

that his father told him he wanted to make him a stockholder in the

corporation and would take steps to carry that out; that his father

told him that he was anxious that he own stock in order that he would be protected and have enough stock to insure him an income; that his father stated that he feared that the sons Edward, Johnnie, Vincent and Thomas would so regulate their salaries that there would be no profits left for distribution and to avoid this, his father wanted to make sure the control of the corporation would rest with members of the family who were not working for the company, - that is the defendant and his sisters; that the plaintiff said he would arrange a meeting with Mr. Heffernan, the attorney for the corporation, and that he would take care of the matter; that two or three weeks later plaintiff and defendant met at Mr. Heffernan's office and had a conversation in Mr. Heffernan's presence and plaintiff told the lawyer that he wanted to make a transfer of seventy-five shares of stock to defendant. The defendant further testified as follows:

"Mr. Heffernan said he thought there should be some other means of providing for my care and to protect and insure me an income. He said he did not think it wise to make clerics stockholders of the corporation. * * *

My father told Mr. Heffernan that he had decided to do this and that he was determined to do it and he told Mr. Heffernan that he would proceed to do it. Mr. Heffernan then proceeded to draw up the certificate. He cancelled my father's certificate.

Certificate No. 15 is in Mr. Heffernan's handwriting and my father signed it at that time,

At that time, the words 'Attest: John P. O'Malley' were not on it. After my father signed it, Mr. Heffernan took it back. He told me to take it and put it in my vault, then it was left on the desk there. Mr. Heffernan said, 'When that is signed by your brother,' and he handed it to me 'You will put it in your vault, Father.'

I said I would. I left the certificate there and I told my father I had no vault and he said I could put it in the corporation vault. * * *

Mr. Heffernan was a deaf man. This was said in Mr. Heffernan's office but he did not hear it.

The next thing that occurred at that meeting was that my father proceeded to make a Will. * * *

The first time my father talked definitely about giving me the stock was, I remember, I came and told him about having insurance -. I had an operation for goiter and my heart was in bad condition and I was rejected and I was rather worried. I wanted to take an endowment policy. My father said:

told him that he was anxious that he own stock in order that he would be protected and have enough stock to insure his income; that his father stated that he feared that the sons, Edward, Johnnie, Vincent and Thomas would be regular thieves and that there would be no profits left for distribution and to avoid this, his father wanted to make sure the control of the corporation would rest with members of the family who were not working for the company, - that is the defendant and his sisters; that the plaintiff said he would arrange a meeting with Mr. Heffernan, the attorney for the corporation, and that he would take care of the matter; that two or three weeks later plaintiff and defendant met at Mr. Heffernan's office and had a conversation in Mr. Heffernan's presence and plaintiff told the lawyer that he wanted to make a transfer of twenty-five shares of stock to defendant. The defendant further testified as follows:

"Mr. Heffernan said he thought there should be some other means of providing for my sons and to protect and insure me an income. He said he did not think it wise to make electric stockholders of the corporation. * * * My father told Mr. Heffernan that he had decided to do this and that he was determined to do it and he told Mr. Heffernan that he would proceed to do it. Mr. Heffernan then proceeded to draw up the certificate. He called it my father's certificate. Certificate No. 12 is in Mr. Heffernan's handwriting and my father signed it at that time. At that time, the words 'Attest: John P. O'Reilly' were not on it. After my father signed it, Mr. Heffernan took it back. He told me to take it and put it in my vault, then it was left on the desk there. Mr. Heffernan said, 'then that is signed by your brother,' and he handed it to me 'You will put it in your vault, father.' I said I would. I left the certificate there and I told my father I had no vault and he said I could put it in the corporation vault. * * * Mr. Heffernan was a good man. This was said in Mr. Heffernan's office but he did not hear it. The next thing that occurred at that meeting was that my father proceeded to make a will. * * * The first time my father talked seriously about giving me the stock was, I remember, I came and told him about having insurance -- I had an operation for cancer and my heart was in bad condition and I was rejected and I was rather worried. I wanted to take an investment policy. My father said:

'Don't worry about insurance, I have money to take care of you. You have nothing to worry about.'

That was in the summer of my ordination in the year 1921. * * *

Father said he was very anxious to provide me with property and stock that would assure me a living. I told him that I was more than grateful to him and we spoke.

At the time I asked, 'Was he going to transfer to me my share, that is, one-seventh of the stock?' he said 'No, that would not be sufficient to give me protection.' He said, 'Well, now we will go over to Mr. Heffernan's and arrange for that.' And a month later it was done. * * *

At my meeting with Mr. Heffernan at his office, in 1933, he asked me if I would give the stock back, advancing as a reason that if my mother succeeded in getting her dower rights, my father would lose control of the corporation. * * *

My father first asked me to endorse the stock in a letter in December, 1930. The first time he made a real demand was at the house. That was also in December. I had no further conversation with my father in that regard. Subsequent requests were made by either Mr. Fitzgerald or John. * * *

Mr. Heffernan said that if I returned the stock he would see to it that my mother would receive one-third of my 75 shares and one-third of the 108 shares that my father held in his name. My brother John said he thought that if the stock was given back and the arrangement made, one-third given to my mother and one-third of my father's, that it might quiet down.

My father then, with the aid of Mr. Heffernan, drew up the outline of his will. After subtracting the number of shares he gave me, he willed the other shares.

Mr. Heffernan asked my father for the names of the children and wrote them down on a piece of paper. Then my father said to me, 'I want one-third of those shares to go to my wife.' I think it was something like 116 shares - excluding the 75 shares that had been transferred to me.

When my father came into the discussion of my brother Edward, the oldest son, my father did not want to leave him anything. I said, 'Dad, you should not do that. According to the state law you could disinherit him, but according to the natural law he is not deserving of it. That is, of being disinherited.'

In this outline that Mr. Heffernan was making, my name was reached. My mother was left one-third. My father thought he would leave me 26 more shares so as to make sure the control of the corporation would rest in my name. My father told Mr. Heffernan that I, being a priest and being unmarried, he thought, would look after my mother and sisters in the event of his death much better than my married brothers."

The evidence in this case clearly shows that the conveyance from the father to the son was a gift fully accomplished by the transfer on the books of the company of the 75 shares of stock to plaintiff's son and from which the son received the income during the

'Don't worry about insurance, I have money to take care of you. You have nothing to worry about.' That was in the summer of my graduation in the year 1931.

Father said he was very anxious to provide me with property and stock that would secure me a living. I told him that I was more than grateful to him and we shook hands. At the time I asked, 'Are you going to transfer to me my share, that is, one-seventh of the stock?' he said 'No, that would not be sufficient to give me protection.' He said, 'Well, now we will go over to Mr. Heffernan's and arrange for that.' And a month later it was done. At my meeting with Mr. Heffernan at his office, in 1932, he asked me if I would give the stock book, conveying as a reason that if my mother succeeded in getting her lawyer rights, my father would lose control of the corporation. My father first asked me to endorse the stock in a letter in December, 1930. The first time he asked a real demand was at the house. That was also in December. I had no further conversation with my father in that regard. Subsequent requests were made by either Mr. Heffernan or John.

Mr. Heffernan said that if I returned the stock he would see to it that my mother would receive one-third of my 75 shares and one-third of the 108 shares that my father held in his name. My brother John said he thought that if the stock was given back and the arrangement made, one-third given to my mother and one-third of my father's, that it might quiet down.

My father then, with the aid of Mr. Heffernan, drew up the outline of his will. After signing the number of shares he gave me, he killed the other parties. Mr. Heffernan asked my father for the names of the children and wrote them down on a piece of paper. Then my father said to me, 'I want one-third of those shares to go to my wife.' I think it was something like this: 'excluding the 75 shares that had been transferred to me.' When my father came into the discussion of my brother's share, the oldest son, my father did not want to leave him anything. I said, 'Well, you should not do that. According to the state law you could disinherit him, but according to the natural law he is not deserving of it. That is, of being disinherited.'

In this outline that Mr. Heffernan was making, my name was included. My mother was left one-third. My father thought he would leave me 25 shares as a gift. The control of the corporation would rest in my name. My father told Mr. Heffernan that I, being a child and minor, unwanted, as I thought, would look after my mother and sisters in the event of his death much better than my married brothers.

The evidence in this case clearly shows that the corporation from the father to the son was a gift fully accomplished by the transfer on the books of the company of the 75 shares of stock to plaintiff's son and from which the son received the income during the

period of approximately 10 years and, apparently in 1930, the father having domestic troubles with his wife, conceived the idea of recalling the gift of 75 shares of stock which he had made to his son. The reason for this action on his part was no doubt because the son had taken sides with the mother in the domestic controversy between defendant's father and mother.

It appears from the record that counsel for the plaintiff takes the position that the burden of proof in this suit is upon the defendant for in the trial of the case he said:

" * * * under the pleadings, the burden of proof I believe is on the defendant here so that for the present I rest."

In the bill that was filed by plaintiff, the plaintiff asked for a reconveyance of the stock and asked "that the court may decree a trust in said certificate numbered 15 resulting in favor of your orator * * *".

Whatever may be the position of counsel as to whether this is a resulting trust or an express trust (the latter he now maintains is the correct position) the burden of proof remains upon the plaintiff to prove the allegations by a preponderance of the evidence.

As the Supreme Court of this state said in the case of Gusack v. Gusack, 339 Ill. 108, at page 120:

"Where it is sought to establish a trust by parol evidence, the proof must be clear, convincing and so strong, unequivocal and unmistakable as to lead to but one conclusion, and if the evidence is doubtful or capable of reasonable explanation upon theories other than the existence of a trust it is not sufficient. (Wies v. O'Horow, 337 Ill. 267; Geraghty v. Geraghty, 335 id. 494; Neagle v. McMullen, 334 id. 168.)"

In the case of Chicago Title & Trust Co. v. Ward, 332 Ill. 126, at page 132, the court said:

"There are a number of cases in the Appellate Court holding that a transfer of stock on the books of the corporation passes the legal title. While those opinions are not authority here, that in Colton v. Williams, 65 Ill. App. 466, written by the late Mr. Justice Cartwright, is

period of approximately 10 years and, apparently in 1930, the father having domestic troubles with his wife, conceived the idea of recalling the gift of 75 shares of stock which he had made to his son. The reason for this action on his part was no doubt because the son had taken sides with the mother in the domestic controversy between defendant's father and mother.

It appears from the record that counsel for the plaintiff takes the position that the burden of proof in this suit is upon the defendant for in the trial of the case he said:

" * * * under the pleadings, the burden of proof I believe is on the defendant here as to the present I rest."

In the bill that was filed by plaintiff, the plaintiff asked for a reconveyance of the stock and asked "that the court may decree a trust in said certificate numbered 15 resulting in favor of your or for * * *".

Whatever may be the position of counsel as to whether this is a resulting trust or an express trust (the latter he now maintains is the correct position) the burden of proof remains upon the plaintiff to prove the allegations by a preponderance of the evidence. As the Supreme Court of this state said in the case of Quack v. Quack, 338 Ill. 108, at page 130:

"Here it is sought to establish a trust by parol evidence, the proof must be clear, convincing and so strong, unambiguous and unmistakable as to lead to but one conclusion, and if the evidence is doubtful or capable of reasonable explanation upon theories other than the existence of a trust it is not sufficient." (Quack v. Quack, 337 Ill. 327; Quack v. Quack, 338 Ill. 108; Quack v. Quack, 334 Ill. 108.)

In the case of Chicago Title & Trust Co. v. Ward, 337 Ill. 136, at page 132, the court said:

"There are a number of cases in the Appellate Court holding that a transfer of stock on the books of the corporation passes the legal title. With those opinions we not authority here, that in Collins v. Collins, 331 Ill. App. 486, written by the late Mr. Justice Carter, is

a clear statement of the rule. Upon the peculiar facts of that case Judge Cartwright said: 'A share of stock is defined to be the right which its owner has in the management, profits and ultimate assets of the corporation. (Cook on Stock and Stockholders, sec. 5.) The shareholder acquires the right to participate, according to the amount of his stock, in the management of the corporation, its dividends, and its assets remaining on dissolution of the corporation, after the payment of debts. The title to stock is created by registry in the books of the corporation. The certificate is not the stock itself but only evidence of the ownership of the stock. It has value only as such evidence, and apart from the shares which it represents it is worthless. It is not essential, and a registered stockholder may exercise all his privilege without it. He had power to transfer his stock, to receive dividends and to vote, and he is individually liable as a stockholder although without the usual voucher in the form of a certificate. (Cook on Stock and Stockholders, sec. 10; Beach on Private Corporations, sec. 972.) * * *

In the instant case at the time of the transfer of the stock to the defendant, the certificate remained in the lawyer's office so that the secretary of the company could put his signature on it, which he did later. The son, defendant herein, having no safety deposit box, it was suggested that the stock be put in the safe of the Standard Asbestos Manufacturing Company, which was done, and it remained there through the years during which time he received the income by way of dividends thereon.

In the argument of counsel for appellant on page 4 of their brief, in describing the meeting in the lawyer's office where the stock was transferred, it is said:

"In the conversation which took place on that occasion, it was agreed by father and son that the sole purpose for the issuance of the certificate was to invest the defendant with colorable evidence of financial responsibility to the end that the latter might obtain such ecclesiastical appointments as he might desire."

In other words, according to the theory of the plaintiff the father and the son had engaged in a conspiracy to obtain an appointment for the defendant by misrepresentation and fraud to be perpetrated upon the church authorities and that the representations to be made by the son were, in fact, untrue. And as counsel later say:

" * * * and that the certificate and the stock represented thereby would at all times be and remain the property of the plaintiff."

a clear statement of the rule. Upon the peculiar facts of the case Judge C. J. Wright said: 'A share of stock is defined to be the right which the owner has in the management, profits and ultimate assets of the corporation. (Cook on Stock and Stockholder, sec. 3.) The shareholder acquires the right to participate, according to the amount of his stock, in the management of the corporation, its dividends, and its assets remaining on dissolution of the corporation, after the payment of debts. The title to stock is created by registry in the books of the corporation. The certificate is not the stock itself but only evidence of the ownership of the stock. It has value only as such evidence, and apart from the shares which it represents it is worthless. It is not essential, and a registered stockholder may exercise all his privileges without it. He had power to transfer his stock, to receive dividends and to vote, and he is individually liable as a stockholder although without the usual voucher in the form of a certificate. (Cook on Stock and Stockholders, sec. 10; Bech on Private Corporations, sec. 372.)' * * *

In the instant case at the time of the transfer of the stock to the defendant, the certificate remained in the lawyer's office so that the secretary of the company could put his signature on it, which he did later. The son, defendant herein, having no safety deposit box, it was suggested that the stock be put in the safe of the Standard Asbestos Manufacturing Company, which was done, and it remained there through the years during which time he received the income by way of dividends thereon.

In the argument of counsel for appellant on page 4 of their brief, in describing the meeting in the lawyer's office where the stock was transferred, it is said:

"In the conversation which took place on that occasion, it was agreed by father and son that the sole purpose for the issuance of the certificate was to invest the defendant with colorable evidence of financial responsibility to the bank and that the latter might obtain such collateral appointments as he might desire."

In other words, according to the theory of the plaintiff, the father and the son had engaged in a conspiracy to obtain an appointment for the defendant by misrepresentation and fraud to be presented upon the church authorities and that the representations to be made by the son were, in fact, untrue. And as counsel later say:

"* * * and that the certificate and the stock represented thereby would at all times be and remain the property of the plaintiff."

Even if plaintiff's version of the transaction, which is not in fact sustained by the evidence, were accepted as true, he could not recover. The only purpose of the transaction according to plaintiff's statements was to deceive the church authorities by making representations to them that his son possessed and owned the stock in question and thereby induce them to appoint his son in another diocese which, otherwise, they would not have done. Such a transaction would be fraudulent and the rule^{is} that where two or more persons engage in a transaction to injure another, neither law nor equity will interfere to relieve either of the parties as against the other from the consequences of their own misconduct. Flack v. Warner, 278 Ill. 368; Kirkpatrick v. Clark, 132 Ill. 342; Kaufman v. Sorrels, 164 Ill. App. 324.

We are satisfied from a review of this case, both as to the facts and the law applicable thereto, that the chancellor arrived at the correct conclusion that the plaintiff should not recover. Therefore, for the reasons herein given, the decree of the Circuit Court is affirmed.

DECREE AFFIRMED.

HEBEL AND HALL, JJ. CONCUR.

Even if Plaintiff's version of the transaction, which is not in fact sustained by the evidence, were accepted as true, he could not recover. The only purpose of the transaction according to Plaintiff's statements was to deceive the church authorities by making representations to them that his son possessed and owned the stock in question and thereby induce them to appoint his son in another diocese which, otherwise, they would not have done. Such a transaction would be fraudulent and the rule that where two or more persons engage in a transaction to injure another, neither law nor equity will interfere to relieve either of the parties against the other from the consequences of their own misconduct. Black v. Turner, 278 Ill. 368; Kingstreak v. Clark, 132 Ill. 346; Kaufman v. Gorrals, 184 Ill. App. 324. The facts are stated from a review of this case, both as to the facts and the law applicable thereto, that the Chancellor arrived at the correct conclusion that the Plaintiff should not recover. Therefore, for the reasons herein given, the decree of the Circuit Court is affirmed.

DECEMBER AFFIDAVIT.

HERBIE AND HALL, JJ. CONCUR.

38618

ARDASHES BOROYAN, AVEDIS BOGHOSIAN,
ARDASHES NIGOGHOSIAN, VARTAIN OURFALIAN,
PARSEK KNARIAN, SOUREN DERDERIAN and
STEPHEN AYVAZIAN,

Appellees,

v.

MAMOOG MONSESIAN, GARABED SOGHIGIAN,
GARABED KAKARIAN, VAHABED MATTESIAN,
VISHON HALAJAN, PARSEGH DELAIAN, HARRY
ESKIGIAN and CHURCH OF ARMENIA IN
AMERICA, a corporation,

Appellants.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

287 I.A. 626'

MR. JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

This is an appeal from a decree of the Circuit Court of Cook County, restraining and enjoining the defendants from interfering with complainants designated in the bill as the members, officers, trustees and spiritual officials of the Armenian Apostolic Church of West Pullman, in the exercise of their spiritual or temporal duties towards the church, and from interfering with the church meetings, and from disposing of any of the real property of the church. The decree is based upon the theory that the plaintiffs are the legally elected and qualified trustees of the Armenian Apostolic Church of West Pullman, located at 12032 South Wallace Street in the City of Chicago.

It appears that at a meeting of the members of this church held on December 17th, 1933, the defendants were elected as trustees. In the brief filed here, plaintiffs claim that the defendants unlawfully assumed to act as such trustees because the minutes of the election were never sent to the Central Executive Committee of the prelacy, as required by the constitution and rules of the church, because the election of defendants was never confirmed by the Central Executive Committee of the church body, as required by the constitution and rules, and because the Central Executive Committee terminated

the board of trustees composed of defendants and appointed plaintiffs to act as a temporary board of trustees in their stead. It is not claimed that defendants' election was not held in a legal and lawful manner, and it is not shown that any charges were formally made against them, or that they were ever given any opportunity for a hearing.

The record indicates that after the election of these defendants as trustees, Ardashes Boroyan, one of the plaintiffs, received the following letter from Mampre Calfayan, who signs it as the "Acting Prelate of the Armenian Church in America:"

"March 14, 1934.

Mr. Ardashes Boroyan,
Chairman of the Provisional Board of Trustees
of the Armenian Apostolic Church,
West Pullman, Ill.

Dear Sir:

This Prelacy took under consideration the various charges made against the Board of Trustees in violating the Canons and Constitution of our Church, by virtue of Articles 27, 31 and 61 and other provisions of the Constitution, the Prelacy at a meeting held on January 20th, 1934, terminated the board of trustees and in their place and stead the following members of your Church have been designated to act as temporary Board of Trustees until the further order of this Prelacy.

Ardashes	Boroyan
Avedis	Boghossian
Ardashes	Nigoghossian
Vartan	Ourfalian
Parsekh	Knarian
Souren	Derderian
Stepan	Ayvazian

This prelacy, in the future will notify the temporary Board to call an election of a permanent Board by the members of your church.

With fatherly blessings, I remain

Mampre Calfayan,
Rt. Rev. Rev. Mampre Calfyan,
Acting Prelate of the Armenian
Church in America."

It is upon the authority of this epistle that plaintiffs assume to act.

the board of trustees composed of defendants and associated individuals to set as a temporary board of trustees in their stead. It is not claimed that defendants' election was not held in a lawful and lawful manner, and it is not shown that any charges were formally made against them, or that they were ever given any opportunity for a hearing. The record indicates that after the election of these defendants as trustees, Ardashes Boroyan, one of the plaintiffs, received the following letter from Mamour Gellayan, who signs it as the "Acting Priests of the Armenian Church in America":

"March 14, 1934.

Mr. Ardashes Boroyan,
Chairman of the Provisional Board of Trustees
of the Armenian Apostolic Church,
East Pullman, Ill.

Dear Sir:

This Prelacy took under consideration the various charges made against the Board of Trustees in violation of the Canons and Constitution of our Church, by virtue of Articles 27, 31 and 32 and other provisions of the Constitution, the Prelacy at a meeting held on January 10th, 1934, terminated the board of trustees and in their place and stand the following members of your church have been designated to set a temporary board of trustees until the further order of this Prelacy.

- Ardashes Boroyan
- Armenian
- Armenian
- Armenian
- Armenian
- Armenian
- Armenian
- Armenian
- Armenian
- Armenian

This Prelacy, in the future will notify the temporary Board to call an election of a permanent board by the members of your church.

With friendly greetings, I remain

Respectfully,
Rev. Mamour Gellayan,
Acting Priest of the Armenian
Church in America."

It is upon the authority of this ecclesiastical authority that plaintiffs assume to act

The constitution of the Armenian Holy Apostolic Church, of which the church in question is a member, was offered in evidence in the Circuit Court, by agreement of all the parties. By article 27, under the heading, "The Prelate of the Diocese", it is provided that the duties of the prelate are as follows: "To exercise supervision over the ceremonies, rites and creed of the Armenian Apostolic Church, and see that they are observed. To present proposals to such bodies that have jurisdiction, for the discharge from office of these officials and committees that act contrary to the stipulations of this constitution." Articles 28, 29 and 31, of such constitution, under the heading, "Rules for Conducting the Meetings", provide as follows:

"Article 28. The decisions given and the elections held by a Membership Meeting, are put into execution after being approved and confirmed by the Central Executive Committee.

"Article 29. In case the Central Executive Authorities revoke the decision of a Membership Meeting, or delay the approval of it, it is possible to appeal to the Supreme Spiritual Authorities.

"Article 31. In order to select candidates the chairman will distribute to the members present, slips of paper that have marginal notes and a seal on them. The clerk gathers these slips, counts them and reads them under the supervision of the chairman and the vice-chairman, and makes a note of the votes received by each candidate. After this, the names of the candidates are put to vote, beginning with the candidate that has received the largest number of votes in the primary voting."

Article 49 of this constitution provides that "Complaints against the church trustees should be in writing, and should be directed to the Central Executive Committee for its decision." Article 51 provides that "The Central Executive Committee has authority to dissolve the Church Trustees and to order new elections, if the trustees have disregarded the Diocesan Constitution of the Armenians in America, and when it has lost its majority through resignations and for other reasons."

We gather from the record that the controversy here results from a general schism in the Armenian church in the United States, and that the schism has produced litigation in other states of the

The constitution of the American Baptist Church, of which the church in question is a member, was offered in evidence in the Circuit Court, by argument of all the parties. By article 37, under the heading, "The rights of the churches", it is provided that the duties of the presbytery are as follows: "To exercise supervision over the ceremonies, rites and creed of the churches subordinate to them, and see that they are observed. To present proposals to such bodies that have jurisdiction, for the discharge from office of their officials and committees that act contrary to the stipulations of this constitution." Articles 35, 36 and 37, of such constitution, under the heading, "Rules for conducting the meetings", provide as follows:

"Article 38. The decisions given and the elections held by a Membership Meeting, are put into execution after being approved and confirmed by the Central Executive Committee." "Article 39. In case the Central Executive Committee revoke the decision of a Membership Meeting, on any of the approval of it, it is possible to appeal to the Executive Committee." "Article 41. In order to select candidates the chairman will distribute to the members present, a list of names of candidates, and a card on which they have to write their names. These slips, counts them and reads them under the supervision of the chairman and the vice-chairman, and makes a note of the votes received by each candidate. After this, the names of the candidates are put to vote, beginning with the candidate that has received the largest number of votes in the primary voting."

Article 43 of this constitution provides that "Complaints against the church trustees should be in writing, and should be directed to the Central Executive Committee for its decision." Article 44 provides that "The Central Executive Committee has authority to dissolve the Church Trustees and to order new elections, if the trustees have disregarded the Disciplinary Constitution of the church in America, and when it has lost its unity through rebellious and for other reasons."

We gather from the record that the controversy here results from a general schism in the American church in the United States, and that the schism has produced litigation in other states of the

Union. A similar dispute arose between Armenian church factions in the state of Pennsylvania, in which trustees, apparently elected in the same manner as the defendants here, representing the same faction as defendants, sought to restrain persons representing the faction represented by the plaintiffs in this case, from exercising their claimed rights. In Lulejian et al. v. Hagopian et al., 317 Pa. 433, in sustaining the right of plaintiffs in that case to an injunction restraining the persons who assumed to act as trustees from acting as such, and under a situation which seems to be similar to that of the plaintiffs in this case, the Supreme Court of Pennsylvania said:

"Were plaintiffs removed from office, and if so, was the removal lawful? For present purposes, we assume that a lawfully constituted central executive committee of the Armenian Holy Apostolic Church of America had power, under the church constitution, to remove plaintiffs and to provide for the designation of their successors. The learned chancellor was unable to find from the evidence that the central executive committee, under whose action defendants claimed to exercise the right to act as members of the parish council, was the lawfully constituted central executive committee of the church, as distinguished from another central executive committee, also claiming to be the lawfully constituted committee. He found that, prior to the date when the removal of plaintiffs was said to have taken place, no notice was given to them 'that any charges had been brought against them, or that their removal was being considered by the Central Executive Committee,' and that 'no hearing was held' by that committee 'in connection with the removal of plaintiffs.'

"At the oral argument, defendants' counsel conceded that such notice was not given and that no hearing was held, but contended that plaintiffs had deprived themselves of the right to notice by repudiating, or refusing to recognize, the authority of that central executive committee which, defendants claim, was the lawfully constituted committee. The record does not require a discussion of this argument. Defendants concede that plaintiffs were lawfully elected for the term stated, and that they had been in possession performing the duties of the parish council up to the time of the alleged removal. The burden of proof that they were lawfully removed was therefore on the defendants. McDowell v. Wilson, 252 Pa. 91, 94, 97 A. 100. The learned chancellor said 'there is no evidence from which we can find * * * (that) * * * the alleged removal of plaintiffs was by a body authorized to remove.' Unless it appeared that

Union. A similar dispute arose between American church factions in the state of Pennsylvania, in which trustees, apparently elected in the same manner as the defendants here, representing the same faction as defendants, sought to restrain persons representing the faction represented by the plaintiffs in this case, from exercising their claimed rights. In Intestates et al. v. Heston et al., 217 Pa. 433, in sustaining the right of plaintiffs in that case to an injunction restraining the persons who assumed to act as trustees from acting as such, and under a situation which seems to be similar to that of the plaintiffs in this case, the supreme court of Pennsylvania said:

"Were plaintiffs removed from office, and if so, was the removal lawful? For present purposes, we assume that a lawfully constituted central executive committee of the American Holy Apostolic Church of America had acted, under the church constitution, to remove plaintiffs and to provide for the designation of their successors. The learned chancellor was unable to find from the evidence that the central executive committee, under whose action defense was claimed to exercise the right to act as members of the parish council, was the lawfully constituted central executive committee of the church, as distinguished from another central executive committee. He also claimed to be the lawfully constituted committee. We found that, prior to the date when the removal of plaintiffs was said to have taken place, no notice was given to them, that any charges had been brought against them, or that their removal was being considered by the central executive committee, and that no hearing was held by that committee in connection with the removal of plaintiffs."

"At the oral argument, defendants' counsel conceded that such notice was not given and that no hearing was held, but contended that plaintiffs had derived themselves of the right to notice by repudiation, or failing to repudiate, the authority of that central executive committee which, defendants claim, was the lawfully constituted committee. The record does not require a discussion of this argument. Defendants concede that plaintiffs were lawfully elected for the term stated, and that they had been in possession performing the duties of the parish council up to the time of the alleged removal. The burden of proof that they were lawfully removed was therefore on the defendants. McGowan v. Wilson, 332 Pa. 61, 84, 97 A. 1001. The learned chancellor said: 'There is no evidence from which we can find * * * (that) * * * the alleged removal of plaintiffs was by a body authorized to remove.' Unless it appeared that

this body was what it purported to be, which depended on evidence, the effect of refusing to recognize it and of disregarding its requests became immaterial. The chancellor also found that the action of the central executive committee, on which defendants rely, was a mere threat to remove on a contingency stated, and that, in fact, no removal by the committee was ordered; that the order of removal relied on was by the prelate of Armenians in America, not by the committee, and that the committee had no power to delegate its authority to the prelate.

"Having concluded that defendants had not shown that the central executive committee, under whose authority they claimed the right to act, was the lawfully constituted central executive committee, and having concluded, on evidence, that, in any event, the plaintiffs had not been removed in accordance with the church constitution, the decree was inevitable. Nothing need be added to what was said in the learned chancellor's adjudication and in the opinion of the court in banc disposing of the exceptions filed by defendants."

Article 51 of the Constitution of the church above quoted, limits the power of removal of trustees duly elected to the Central Executive Committee. There is nothing in the record to indicate that the Central Executive Committee ever acted in the matter, or that it delegated to Galfayan, who described himself as acting prelate, any power to remove defendants, even assuming that such committee had the right and power to do so. From anything appearing to the contrary, the only notification that defendants ever received of the attempted exercise of any such power, was by the bill filed in this case.

The decree of the Circuit Court of Cook County is reversed.

REVERSED.

DENIS E. SULLIVAN, P.J. AND HEBEL, J. CONCUR.

this body was what it reported to be, which appeared on evidence, the effect of refusing to recognize it and of disregarding its requests for assistance. The committee also found that the action of the central executive committee, on which defendant rely, was a mere pretext to remove an contingency stated, and that, in fact, no removal by the committee was ordered; that the order of removal relied on was by the prelate of the church in London, not by the committee, and that the committee had no power to delegate its authority to the prelate.

"Having concluded that defendant had not shown that the central executive committee, under those authority they claimed the right to act, was the lawfully constituted central executive committee, and having concluded, on evidence, that in any event, the plaintiff had not been removed in accordance with the church constitution, the decree was inevitable. Nothing need be added to what was said in the learned counsel's address and in the opinion of the court in regard to the disposing of the exceptions filed by defendant."

Article 51 of the Constitution of the church above quoted, limits the power of removal of trustees duly elected to the Central Executive Committee. There is nothing in the record to indicate that the Central Executive Committee ever acted in the matter, or that it delegated to O'Leary, who described himself as acting prelate, any power to remove defendants, even assuming that such committee had the right and power to do so. From anything appearing to the contrary, the only notification that defendants ever received of the attempted exercise of any such power, was by the bill filed in this case.

The decree of the Circuit Court of Cook County is reversed.

REVEREND,
DANIEL M. SULLIVAN, P.L. AND RECTOR, J. C. CROFT.

38632

JEAN S. GEARY, as Assignee,

Plaintiff and Appellee,

v.

THE GREAT ATLANTIC & PACIFIC TEA
COMPANY, a corporation,

Defendant and Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

287 I.A. 626²

MR. JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment recovered in an action against defendant for rent. The cause was tried upon a stipulation of facts. The stipulation is, in substance, that the Foreman Bank was appointed Receiver of the premises known as 3309 West Madison Street, Chicago, Illinois, on February 26th, 1930; that on July 16th, 1931, it resigned as Receiver and Joseph B. Ford was appointed Successor Receiver and succeeded to all the rights and claim of the Foreman Bank; ^{that} the Foreman Bank, as Receiver, assigned its claim against the defendant to the plaintiff on January 27th, 1933, by an instrument in writing, and Joseph B. Ford, as Successor Receiver, by an instrument in writing, assigned his claim against the defendant to the plaintiff on January 14th, 1933, pursuant to a court order, and that the plaintiff is the actual bona fide owner of said claim against the defendant; that the defendant occupied a store at 3309 West Madison Street as tenant of the Foreman Bank, as Receiver, from the first day of May, 1930, to April 30th, 1931, under the terms of lease expiring April 30th, 1931; that on February 25th, 1931, defendant wrote the Foreman Bank enclosing unsigned original and duplicate copies of a renewal lease for one year, commencing May 1st, 1931, at a monthly rental of \$125.00, and requested the Foreman Bank to have both copies signed and returned to defendant at its earliest convenience. The letter referred to, dated February 25th, 1931, from defendant to the Foreman Bank,

38633

JEAN S. GRAY, as Assignee,

Plaintiff and Appellee,

v.

THE GREAT ATLANTIC & PACIFIC COAST
COMPANY, a corporation,

Defendants and Appellant.

IN CHANCERY.

ALFRED W. HEN

ALFRED W. HEN

287 I.A. 626

MR. JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment recovered in an action against defendant for rent. The cause was tried upon a stipulation of facts. The stipulation is, in substance, that the foreman bank was appointed Receiver of the premises known as 3309 West Madison Street, Chicago, Illinois, on February 25th, 1931; that on July 18th, 1931, it resigned as Receiver and Joseph H. Ford was appointed Successor Receiver and proceeded to all the rights and claims of the foreman bank; that the foreman bank, as Receiver, assigned its claim against the defendant to the plaintiff on January 14th, 1932, by an instrument in writing, and Joseph H. Ford, as Successor Receiver, assigned his claim against the defendant to the plaintiff on January 14th, 1932, pursuant to a court order, and that the plaintiff is the actual bona fide owner of said claim against the defendant; that the defendant occupied a store at 3309 West Madison Street as tenant of the foreman bank, as Receiver, from the first day of May, 1930, to April 30th, 1931, under the terms of lease expiring April 30th, 1931; that on February 25th, 1931, defendant wrote the foreman bank enclosing original and duplicate copies of a renewal lease for one year, commencing May 1st, 1931, at a monthly rental of \$125.00, and requested the foreman bank to have both copies signed and returned to defendant at its earliest convenience. The letter returned to, dated February 25th, 1931, from defendant to the foreman bank,

Receiver, is as follows:

"Re: 3309 W. Madison Street

Herewith original and duplicate copies of renewal lease for one year commencing May 1st, 1931, at a monthly rental rate of \$125.00 with one one-year renewal privilege at \$135.00 per month.

Kindly have both copies properly signed, and return to this office at your earliest convenience."

It is further stipulated that on March 2nd, 1931, the Foreman Bank forwarded the leases to its attorney and requested him to procure the necessary court authority to execute the same; that on March 6th, 1931, the Foreman Bank, as Receiver, was authorized to execute said lease by a court order; that on March 7th, 1931, at 10:30 A.M. the Foreman Bank, having executed said leases, placed the same, properly stamped, in the U. S. Mail, addressed to the defendant. The letter offered and received in evidence by agreement is dated March 7th, 1931, from the Foreman Bank addressed to defendant, and is as follows:

"We are pleased to advise you that the Court has authorized us to execute a lease with your Company from May 1st, 1931, for a period of one year at a monthly rental of \$125.00.

We are returning herewith two leases for signature. Kindly return the original, retaining a copy for your files."

It is stipulated that on March 7th, 1931, at 1:30 P.M., defendant addressed a letter to the Foreman Bank, as Receiver, notifying plaintiff that it did not intend to renew its lease after the expiration of its then present term on April 30th, 1931, which letter was received by the Foreman Bank on March 9th, 1931; that this letter was written to the Foreman Bank by the defendant without it having any notice of the court order, or the execution of the leases by the Foreman Bank, or of the deposit of the same in the mail addressed to the defendant. Plaintiff's letter just referred to, offered and received in evidence is dated March 7th, 1931, and is as follows:

Receiver, is as follows:

"Re: 3307 W. Madison Street

Herewith original and duplicate copies of renewal lease for the year commencing May 1st, 1931, at a monthly rental rate of \$135.00 with one one-year renewal privilege at \$135.00 per month.

Kindly have both copies properly signed, and return to this office at your earliest convenience."

It is further stipulated that on March 2nd, 1931, the Foreman Bank forwarded the lease to the attorney and requested him to procure the necessary court authority to execute the same; that on March 8th, 1931, the Foreman Bank, as Receiver, was authorized to execute said lease by a court order; that on March 7th, 1931, at 10:30 A.M., the Foreman Bank, having executed said lease, placed the same, properly stamped, in the U. S. Mail, addressed to the defendant. The letter offered and received in evidence by agreement is dated March 7th, 1931, from the Foreman Bank addressed to defendant, and is as follows:

"We are pleased to advise you that the Court has authorized us to execute a lease with your Foreman Bank May 1st, 1931, for a period of one year at a monthly rental of \$135.00.

We are returning herewith two leases for signature. Kindly return the original, retaining a copy for your files."

It is stipulated that on March 7th, 1931, at 1:30 P.M.,

defendant addressed a letter to the Foreman Bank, as Receiver, notifying plaintiff that it did not intend to renew its lease after the expiration of its then present term on April 30th, 1931, which letter was received by the Foreman Bank on March 8th, 1931; that this letter was written to the Foreman Bank by the defendant without it having any notice of the court order, or the execution of the leases by the Foreman Bank, or of the deposit of the same in the mail addressed to the defendant. Plaintiff's letter just referred to, offered and received in evidence is dated March 7th, 1931, and

is as follows:

"Re: 3309 W. Madison Street

Our Mr. MacKenzie has been negotiating with you for the renewal of our lease on the above store. An offer of \$125.00 per month for the term of one year commencing with May 1st, 1931, and ending with April 30th, 1932, was submitted on our lease form with our letter of February 25th, 1931. To date this offer has not been accepted.

Please accept notice that we withdraw this offer and that we do not intend to renew our lease after the expiration of its present term.

Thank you for your efforts and consideration."

It is stipulated that on April 30th, 1931, defendant addressed a letter to the plaintiff enclosing keys for the premises involved, and advising plaintiff that it had vacated the same and that defendant vacated the premises prior to May 1st, 1931; that the premises were vacant from April 30th, 1931, to April 1st, 1932, and were rented for the month of April, 1932 to a third party for \$60.00 per month, and that wherever the words "Foreman Bank" are used in the stipulation, the words are intended to mean the Foreman State Trust & Savings Bank.

In addition to the stipulation, testimony was offered and received to the effect that an effort was made by plaintiff to rent the premises for the period mentioned in the stipulation.

Plaintiff's theory is that the defendant and plaintiff's assignor entered into a binding contract, wherein and whereby defendant agreed to pay a fixed rental for the premises described in the stipulation, and that the measure of damages is the amount of rent provided to be paid by the draft of the proposed lease referred to in plaintiff's letter to defendant dated February 25th, 1931, which rental is, \$125.00 a month for one year commencing May 1st, 1931. We assume that this theory is based upon the presumption that the mailing of the proposed lease prepared by defendant on February 25th, 1931, and the action of the Foreman Bank, as receiver, in procuring a court order authorizing it to execute

"Re: 3309 S. Madison Street

Our Mr. Mackenzie has been negotiating with you for the renewal of our lease on the above store, in offer of \$25.00 per month for the term of one year commencing with May 1st, 1931, and ending with April 30th, 1932, was submitted on our lease form with our letter of February 25th, 1931. To date this offer has not been accepted.

Please accept notice that we withdraw this offer and that we do not intend to renew our lease after the expiration of its present term.

Thank you for your efforts and consideration."

It is stipulated that on April 25th, 1931, defendant addressed a letter to the plaintiff enclosing copy for the premises involved, and advising plaintiff that it had vacated the same and that defendant vacated the premises prior to May 1st, 1931; that the premises were vacant from April 30th, 1931, to April 1st, 1932, and were rented for the month of April, 1932 to a third party for \$50.00 per month, and that wherever the words "Foreman Bank" are used in the stipulation, the words are intended to mean the Foreman State Trust & Savings Bank.

In addition to the stipulation, testimony was offered and received to the effect that an effort was made by plaintiff to rent the premises for the period mentioned in the stipulation. Plaintiff's theory is that the defendant and plaintiff assignor entered into a binding contract, wherein and whereby defendant agreed to pay a fixed rental for the premises described in the stipulation, and that the measure of damages is the amount of rent provided to be paid by the defendant of the proposed lease referred to in plaintiff's letter to defendant dated February 25th, 1931, which rental is \$25.00 a month for one year commencing May 1st, 1931. We assume that this theory is based upon the presumption that the making of the proposed lease proposed by defendant on February 25th, 1931, and the action of the Foreman Bank as receiver, in procuring a court order authorizing it to execute

the lease, and the mailing of the draft of the lease executed by the plaintiff at 10:30 A.M. on March 7th, 1931, completed a contract between the parties. There might be something in this theory if it were not for the fact that it is shown conclusively by the stipulation that, before the receipt by defendant of the lease executed by the Foreman Bank, defendant had deposited a letter in the mail to plaintiff, notifying plaintiff that he did not intend to renew this lease after the expiration of its then present term, on April 30th, 1931. It is stipulated that this letter was received by the Foreman Bank, receiver, and that the letter was written to the Foreman Bank by the defendant without plaintiff having had any notice of the court order, or of the execution of the lease by the Foreman Bank, and of the deposit of the same in the mails, by plaintiff, addressed to the defendant.

Plaintiff cites the case of United States v. P.J. Carlin Construction Co., 224 Fed. 859, as authority for his contention.

There the court said:

"Where the parties reach an agreement through correspondence, intending that the agreement shall be subsequently expressed formally in a single paper or document, which, when signed, should be the evidence of what had been agreed upon, the obligatory character of the agreement cannot ordinarily be defeated by the failure of either party to sign the formal contract. If the court can see from the writings or correspondence that the minds of the parties have met, that a proposal has been submitted by one party which has been accepted by the other, and that the terms of the contract have been in all respects definitely agreed upon, one of the parties cannot evade or escape from his obligation by refusing to sign the formal contract, which the parties understood was subsequently to be drawn and executed."

In the case at bar, however, it is evident that there had been no meeting of the minds of the parties. By the stipulation, it is established that when defendant mailed its letter by which it withdrew the proposed offer to lease the property, which it had the right

the lease, and the mailing of the draft of the lease executed by the plaintiff at 10:30 A.M. on March 7th, 1931, completed a contract between the parties. There might be something in this theory if it were not for the fact that it is shown conclusively by the stipulation that, before the receipt by defendant of the lease executed by the Foreman Bank, defendant had deposited a letter in the mail to plaintiff, notifying plaintiff that he did not intend to renew this lease after the expiration of its then present term, on April 30th, 1931. It is stipulated that this letter was received by the Foreman Bank, receiver, and that the letter was written to the Foreman Bank by the defendant without plaintiff having had any notice of the court order, or of the execution of the lease by the Foreman Bank, and of the deposit of the same in the mail, by plaintiff, addressed to the defendant.

Plaintiff cites the case of United States v. J. J. Berlin

Construction Co., 234 Fed. 853, as authority for his contention.

There the court said:

"Where the parties reach an agreement through correspondence, intending that the agreement shall be subsequently expressed formally in a single paper or document, which, when signed, should be the evidence of what has been agreed upon, the obligatory character of the agreement cannot ordinarily be defeated by the failure of either party to sign the formal contract. If the court can see from the evidence or correspondence that the minds of the parties have met, that a proposal has been submitted by one party which has been accepted by the other, and that the terms of the contract have been in all respects definitely agreed upon, one of the parties cannot evade or escape from his obligation by refusing to sign the formal contract, which the parties understood was subsequently to be drawn and executed."

In the case at bar, however, it is evident that there had been no meeting of the minds of the parties. By the stipulation, it is established that when defendant mailed its letter by which it withdrew the proposed offer to lease the property, which it had the right

to do at any time before it was notified of its acceptance by plaintiff's assignor, it had no knowledge that the Foreman Bank had signed the lease, that it had been authorized to sign the lease, or that it intended to enter into the contract.

We are of the opinion that inasmuch as there had been no completed contract between the parties, the court was in error in entering the judgment against the defendant. The judgment is, therefore, reversed.

REVERSED.

DENIS E. SULLIVAN, P.J. AND HEBEL, J. CONCUR.

to do at any time before it was notified of its acceptance by

plaintiff's assignor, it had no knowledge that the foreman had signed the lease, that it had been authorized to sign the lease,

or that it intended to enter into the contract.

We are of the opinion that insurance as there had been

no completed contract between the parties, the court was in error in entering the judgment against the defendant. The judgment is,

therefore, reversed.

REVERSED.

THE COURT IS OF THE OPINION THAT THE JUDGMENT SHOULD BE REVERSED.

DEWIS S. GUARINIA, F. J. AND HEBEL, J. CONCUR.

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38642

VASILIOS DEMETROPOULOS, also known as
WILLIAM DEMOS,

Appellant,

v.

ALBERT J. HORAN, Bailiff of the Municipal
Court of Chicago, and WILLIAM ONDREICKA,

Appellees.

73
APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

287 I.A. 626³

MR. JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

Plaintiff filed a petition in the Municipal Court of Chicago in and by which he makes claim to certain personal property levied upon and in the possession of Albert J. Horan, Bailiff of the Municipal Court of Chicago. In the petition it is stated that the levy was made under an execution issued out of the same court. After a trial by the court without a jury, the court found the issues for the defendant, and that the right to the property described in plaintiff's statement of claim is in the defendant. Judgment was entered on this finding, from which judgment this appeal is being prosecuted.

It is the theory of the plaintiff that he, as mortgagee under a chattel mortgage and after a default, had taken possession and was in the legal possession of the property, that the execution levied on the property by the Bailiff of the Municipal Court was not against the mortgagor, but against a third person who was not the owner of the chattels, that the judgment debtor was one of two partners in business who had executed a chattel mortgage upon the property which was foreclosed, that by various transfers, the property became vested in the last mortgagor, and that the execution could not be levied on partnership property on a judgment against one of the partners.

Defendant contends that the judgment debtor was the owner and in possession of the property when the levy was made, and that the mortgage was fraudulent,

VASILIOS DEMETRIPOULOS, also known as
WILLIAM DEMOS,
Defendant,

v.

ALBERT J. BORAN, Plaintiff of the Municipal
Court of Chicago, and WILLIAM DEMOS,
Plaintiff.

OF CHICAGO.

388 I.A. 626

MR. JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

Plaintiff filed a petition in the Municipal Court of

Chicago in and by which he makes claim to certain personal property
levied upon and in the possession of Albert J. Boran, Plaintiff of
the Municipal Court of Chicago. In the petition it is stated that
the levy was made under an execution issued out of the same court.
After a trial by the court without a jury, the court found the issue
for the defendant, and that the right to the property described in
Plaintiff's statement of claim is in the defendant. Judgment was
entered on this finding, from which judgment this appeal is being
prosecuted.

It is the theory of the Plaintiff that he, as mortgagee
under a chattel mortgage and after a default, was taken possession
and was in the legal possession of the property, that the execution
levied on the property by the Plaintiff of the Municipal Court was not
against the mortgage, but against a third person who was not the
owner of the chattels, that the judgment before was one of two persons
in business who had executed a chattel mortgage upon the property
which was foreclosed, that by various transfers, the property became
vested in the last mortgage, and that the execution could not be
levied on partnership property on a judgment against one of the
partners.

Defendant contends that the judgment debtor was the owner
and in possession of the property when the levy was made, and that
the mortgage was fraudulent.

The record indicates that on December 23rd, 1932, George Christopoulos and George Patsoureas were partners in the restaurant business at 4352½ Elston Avenue, Chicago, Illinois, and that on that date they executed and delivered a chattel mortgage upon certain chattels to William Demos, plaintiff herein, to secure the payment of 31 notes in the amount of \$3,500.00, which mortgage contained the usual covenants and provisions as to foreclosure and sale after default; that the mortgagors were in the restaurant business and remained so until April 16th, 1934, when the mortgage was foreclosed and the chattels were sold under the foreclosure; that four notices of sale were posted in the immediate neighborhood of the restaurant, one being placed on the building wherein the restaurant was located, and that two custodians were in possession of this property, one to have charge in the daytime, and the other at night, from April 11th, 1934, to April 16th, 1934, which latter date was the date of the advertised sale of the property; that on April 16th, 1934, the property was sold to Constantine A. Kotsakos for the sum of \$2,200.00, that the purchaser then received a bill of sale from the mortgagee, and that the bill of sale was properly acknowledged and recorded on the same date. The record further indicates that Kotsakos on the same date executed a bill of sale of the chattels to Spyros Poulos for the consideration of \$2,200.00, that this bill of sale was properly acknowledged and recorded on the same date, and that as a part of the purchase price of the chattels, Poulos executed a chattel mortgage on the property to Demos, the plaintiff herein, to secure the payment of 36 notes aggregating \$2,000.00; that thereafter in December, 1934, or January, 1935, the mortgagor moved the property to 4342½ Elston Avenue, Chicago, Illinois, at which time there was a balance of \$1,700.00 due to the plaintiff; that Poulos then executed another chattel mortgage to plaintiff, which included not only the property

The record indicates that on December 1934, George Christopoulos and George Katsouras were partners in the restaurant business at 4357 1/2 Elston Avenue, Chicago, Illinois, and that on that date they executed and delivered a chattel mortgage upon certain chattels to William Demos, Plaintiff herein, to secure the payment of 31 notes in the amount of \$2,500.00, which mortgage contained the usual covenants and provisions as to foreclosure and sale after default; that the mortgages were in the restaurant business and remained so until April 18th, 1935, when the mortgage was foreclosed and the chattels were sold under the foreclosure; that four notices of sale were posted in the immediate neighborhood of the restaurant, one being placed on the building wherein the restaurant was located, and that two custodians were in possession of this property, one to have charge in the daytime, and the other at night, from April 11, 1935, to April 15th, 1935, which latter date was the date of the advertised sale of the property; that on April 15th, 1935, the property was sold to Constantine A. Katsouras for the sum of \$2,500.00; that the purchaser then received a bill of sale from the mortgagor, and that the bill of sale was properly acknowledged and recorded on the same date. The record further indicates that Katsouras on the same date executed a bill of sale of the chattels to Spyros Koulos for the consideration of \$2,500.00, that this bill of sale was properly acknowledged and recorded in the same date, and that as a part of the purchase price of the chattels, Koulos executed a chattel mortgage on the property to Demos, the Plaintiff herein, to secure the payment of 36 notes aggregating \$5,000.00; that thereafter in December, 1935, or January, 1935, the mortgagor moved the property to 4357 1/2 Elston Avenue, Chicago, Illinois, at which time there was a balance of \$2,700.00 due to the Plaintiff; that Koulos then executed another chattel mortgage to Plaintiff, which included not only the property

mentioned in the last mentioned mortgage, but also a number of other articles of personal property, and that this mortgage was properly acknowledged and recorded on the date of its execution. The record further indicates that all of the unpaid notes secured by the mortgage to Demos dated April 16th, 1934, were cancelled, and that the chattel mortgage to secure the same was released. It is indicated that Poulos, the purchaser under the bill of sale dated April 16th, 1934, was in possession of the property from that date until July 15th, 1935. On July 15th, 1935, the last mentioned mortgage being in default, the mortgagee, through his agent, served on the mortgagor a notice of foreclosure, and posted one notice of a mortgagee's sale on the window of the premises where the property was located, and that three other notices were posted in the neighborhood, and that the mortgagee, through the custodian, was thereafter in possession of the property. On July 17th, 1935, the Bailiff took possession of it. Although there is no proof as to the fact of the Bailiff having taken possession of the property under an execution, it is indicated by the petition filed in the cause that the Bailiff made such levy on the property in question under an execution issued on a judgment against George Patsoureas, one of the two partners who executed the first of the chattel mortgages hereinbefore referred to. This seems to be accepted by both parties as the fact.

While several witnesses offered by defendant testified that they saw no notices of the sale of the property under the last foreclosure, as testified to by plaintiff's witnesses, none of them categorically denied that such notices were posted, and so far as it is important in the decision of this case, we will conclude that they were posted, as alleged.

William Ondreicka testified that he is the judgment creditor in the case, and that he had obtained a judgment against George

mentioned in the last mentioned mortgage, but also a number of other articles of personal property, and that this mortgage was properly acknowledged and recorded on the date of its execution. The record further indicates that all of the unpaid notes secured by the mortgage to Demos dated April 15th, 1934, were cancelled, and that the chattel mortgage to secure the same was released. It is indicated that Poules, the purchaser under the bill of sale dated April 15th, 1934, was in possession of the property from that date until July 15th, 1935. On July 15th, 1935, the last mentioned mortgage being in default, the mortgagee, through his agent, served on the mortgagor a notice of foreclosure, and posted one notice of a mortgagee's sale on the window of the premises where the property was located, and that three other notices were posted in the neighborhood, and that the mortgagee, through the custodian, was thereafter in possession of the property. On July 15th, 1935, the Bailiff took possession of it. Although there is no proof as to the fact of the Bailiff having taken possession of the property under an execution, it is indicated by the petition filed in this case that the Bailiff made such levy on the property in question under an execution issued on a judgment against George Houtoureaux, one of the two partners who executed the first of the chattel mortgages heretofore referred to. This seems to be supported by both parties as the fact.

While several witnesses offered by defendant testified that they saw no notice of the sale of the property under the last foreclosure, as testified to by plaintiff's witnesses, none of them categorically denied that such notice was posted, and so far as it is important in the decision of this case, we will conclude that they were posted, as alleged.

William Ondreko testified that he is the judgment creditor in the case, and that he had obtained a judgment against George

Patsoureas, upon the execution involved, that about April 20th, 1935, he visited the premises at 4342½ Elston Avenue and found George Patsoureas on the premises, and asked him for some money on his account, and that Patsoureas was the cook in the restaurant at the time he visited it.

Defendant attacks the various chattel mortgages upon the theory that they are fraudulent and void as against a judgment creditor of Patsoureas. The record clearly indicates that at the time the first mortgage was executed, the title to the mortgaged property was in George Christopoulos and George Patsoureas, as partners in the restaurant business at 4352½ Elston Avenue in the City of Chicago. The judgment is against Patsoureas alone. If we should hold that the evidence shows that all the chattel mortgages were fraudulent and void, this would leave the title to the chattels included in the first mortgage, in the partners. As stated, the judgment upon which the execution issued is against but one of them.

In Karohiunes, v. Mitsias, 257 Ill. App. 95, a trial of right of property was had in the Municipal Court of Chicago, and the judgment of that court was reviewed by the Appellate Court. In that case, three partners executed three notes secured by chattel mortgage on personal property, which was recorded. The mortgage was foreclosed, and the mortgagee purchased all the property at the foreclosure sale. Thereafter, judgment by confession was obtained by a third party against two of the partners on two other notes. While the mortgage was being foreclosed, an execution on this judgment was placed in the hands of the Bailiff of the Municipal Court, who made a levy on the chattels. In holding that the bailiff could not hold the property, and that title thereto was in the mortgagee by reason of the foreclosure of the mortgaged property, this court said:

Patsouras, upon the execution involved; that about April 1935, 1935, he visited the premises at 4343 Madison Avenue and found George Patsouras on the premises, and asked him for some money on his account, and that Patsouras was the cook in the restaurant at the time he visited it.

Defendant attacks the various chattel mortgages upon the

theory that they are fraudulent and void as against a judgment creditor of Patsouras. The record clearly indicates that at the time the first mortgage was executed, the title to the mortgaged property was in George Christopoulos and George Patsouras, as partners in the restaurant business at 4343 Madison Avenue in the City of Chicago. The judgment is against Patsouras alone. It is should hold that the evidence shows that all the chattel mortgages were fraudulent and void, this would leave the title to the chattels included in the first mortgage, in the partners. As stated, the judgment upon which the execution issued is against but one of them.

In Karolynner v. Mitsalis, 257 Ill. App. 30, a trial of

right of property was had in the United States Court of Appeals, and the judgment of that court was reversed by the Appellate Court. In that case, three partners executed three notes secured by chattel mortgage on personal property, which was recorded. The mortgage was foreclosed, and the mortgagees purchased all the property at the foreclosure sale. Thereafter, judgment by confession was obtained against two of the partners on two other notes. While the mortgage was being foreclosed, an execution on this judgment was placed in the hands of the Sheriff of the United States Court, who made a levy on the chattels. In holding that the Sheriff could not sell the property, and that title thereto was in the mortgagees by reason of the foreclosure of the mortgaged property, this court said:

"The two Katsiposes, as partners, each had a right or interest in the chattels subject to the mortgage. Mitsias' judgment was not against the partnership, but against the two Katsiposes individually. Their right or interest in the 'specific partnership property' was 'not subject to attachment or execution, except on a claim against the partnership.'"

Citing and quoting from Secs. 24 and 25 Cahill's Rev. Stat. 1929, entitled Partnerships.

Further the record indicates very clearly that when the levy was made on the property by the Bailiff of the Municipal Court of Chicago, the plaintiff, through his custodians, was in complete possession of it, with every indication that the possession was legal.

The custodian of the Bailiff's office who was placed in possession of this personal property after the levy, testified to the effect that at the time he and the Bailiff made the levy, he rapped on the rear door of the restaurant, and some one told him that he was not to come in; that after he had taken possession, he left the premises and when he came back, the doors were locked, and that he called the squad, - presumably policemen. We conclude from his testimony that he then took forcible possession of the property in question. The mere fact that at the time the judgment creditor visited the premises, he saw Patsoureas working there, is no indication that a fraud had been perpetrated. Plaintiff had a perfect right to employ him if he saw fit. See Funk v. Staats, 24 Ill. 632.

We find nothing in the record to indicate fraud in the transaction, and we are of the opinion that the court was in error in finding for the defendant.

For the reasons stated, the judgment is reversed and the cause is remanded with the direction that the court enter a judgment finding the title to the property in the plaintiff, and that he have possession thereof from the bailiff.

REVERSED AND REMANDED WITH DIRECTIONS.

DENIS E. SULLIVAN, P.J. AND HEBEL, J. CONCUR.

"The two Katalpases, as partners, each had a right or interest in the whole subject to the mortgage. Their judgment was not against the partnership, but against the two Katalpases individually. Their right of interest in the 'specific partnership property' was 'not subject to attachment or execution, except on a claim against the partnership.'"

Sitting and quoting from Sees, 84 and 85 Cahill's Rev. Stat. 1908,

entitled Partnerships.

Further the record indicates very clearly that when the levy was made on the property by the Sheriff of the Municipal Court of Chicago, the plaintiff, through his custodian, was in complete possession of it, with every indication that the possession was legal. The custodian of the plaintiff's office who was placed in possession of this personal property after the levy, testified to the effect that at the time he and the plaintiff made the levy, he rapped on the rear door of the restaurant, and some one told him that he was not to come in; that after he had taken possession, he left the premises and when he came back, the doors were locked, and that he called the agent, - presumably policeman, he concluded from his testimony that he then took forcible possession of the property in question. The mere fact that at the time the judgment creditor visited the premises, he saw no one working there, is no indication that a fraud had been perpetrated. The plaintiff had a perfect right to employ him if he saw fit. See Bank v. State, 24 Ill. 403.

As kind nothing in the record to indicate fraud in the execution, and we are of the opinion that the court was in error in setting aside the judgment.

For the reasons stated, the judgment is reversed and the cause is remanded with the direction that the court enter a judgment finding the title to the property in the plaintiff, and that he have possession thereof from the plaintiff.

REVEREND AND HONORABLE THE JUDGES.

DEWIS E. SULLIVAN, P.J. AND HONORABLE J. COCHRAN.

38628

IDA E. McGRATH, Executrix of the Last Will
and Testament of JOHN P. McGRATH, Deceased,

APPEAL FROM

(Plaintiff) Appellee,

v.

ROBT. STEVENSON & CO., INC.,

CIRCUIT COURT

COOK COUNTY.

(Defendant) Appellant.

287 I.A. 626⁴

MR. JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendant, Robt. Stevenson & Co., Inc., from a decree finding the total amount due from defendant to plaintiff upon an accounting to be \$149,287.05. The decree is based upon a bill for an accounting brought originally by John P. McGrath against the defendant Robt. Stevenson & Co., Inc., an investment banking house, formerly known as Stevenson Bros. & Perry, Inc., and later as Stevenson, Perry, Stacy & Co., and Robert L. Stevenson, Jr., and certain other individuals doing business as Kissel-Kinnicutt & Co. Service of Summons was had only on Robt. Stevenson & Co., Inc., and Robert L. Stevenson, Jr. Subsequent to the filing of the bill John P. McGrath died, and Ida E. McGrath, as executrix, was substituted as plaintiff.

The bill of complaint charges, in general, that by certain fraudulent acts and misrepresentations of Norman R. Ferguson, employed by the defendant as its agent to solicit business for the defendant in the purchase and sale of securities, the defendant wrongfully charged plaintiff's account with certain securities and wrongfully failed to account for certain other securities to which the plaintiff was entitled. Robert L. Stevenson, Jr., and the other individual defendants were charged with having subsequently assumed the liabilities of Robt. Stevenson & Co., Inc.

IDA E. ROBERTS, executrix of the last will and testament of JOHN E. ROBERTS, deceased,

(Plaintiff) vs. ROBT. STEVENSON & CO., INC.,

(Defendant) Appellant.

287 I.A. 626

MR. JUSTICE HERB... THE OPINION OF THE COURT.

This is an appeal by the defendant, Robt. Stevenson & Co., Inc., from a decree finding the total amount due from defendant to plaintiff upon an accounting to be \$149,887.00. The decree is based upon a bill for an accounting brought originally by John E. Roberts against the defendant Robt. Stevenson & Co., Inc., an investment banking house, formerly known as Stevenson Bros. & Perry, Inc., and later as Stevenson, Perry, Stacy & Co., and Robert E. Stevenson, Jr., and certain other individuals doing business as Kissel-Kinnicutt & Co. Service of summons was had only on Robt. Stevenson & Co., Inc., and Robert E. Stevenson, Jr. Pursuant to the filing of the bill John E. Roberts died, and Ida E. Roberts, as executrix, was substituted as plaintiff.

The bill of complaint charges, in general, that by certain fraudulent acts and misrepresentations of Robert E. Stevenson, employed by the defendant as its agent to solicit business for the defendant in the purchase and sale of securities, the defendant wrongfully charged plaintiff's account with certain securities and wrongfully failed to account for certain other securities in which the plaintiff was entitled. Robert E. Stevenson, Jr., and the other individual defendants were charged with having wrongfully received the ill-bitten of Robt. Stevenson & Co., Inc.

The cause was referred to a Master in Chancery of the court, who took and returned into court the evidence, with his conclusions of law and fact in the form of an original report and also an additional report. To both of these reports of the master exceptions were heard. The Chancellor entered a decree in which he found the defendant, Robt. Stevenson & Co., liable to the plaintiff on all but one of the nine transactions between the litigants on which the master had held the plaintiff entitled to recover, and entered a decree adjudging and decreeing that the defendant, Robt. Stevenson & Co., Inc., pay to the plaintiff the sum we have above stated.

The findings of the court, as to the transactions upon which the decree against the defendant is based, are substantially as follows:

1. That on March 4, 1926, defendant sold McGrath 300 shares of Louisiana Oil Refining Company preferred stock, charging his account \$30,030.00; that thereafter its agent, Ferguson, fraudulently and surreptitiously delivered to McGrath three temporary certificates, each for 100 shares of common stock in lieu of the preferred stock; that defendant is indebted to plaintiff for this in the principal sum of \$30,030.00, with interest thereon at 5 per cent from June 6, 1928.
2. That on June 27, 1926, Ferguson, as agent of defendant, represented that the common stock of American Bosshardt Furnace Corporation had a market value of approximately \$51.00 per share, and induced McGrath to give defendant an order for 200 shares of such stock, and thereafter delivered to him an interim receipt for the same; that defendant charged Mr. McGrath's account \$10,200.00 for such stock, it being, in fact, worthless at the time of purchase, which fact, however, was unknown to McGrath at the time; that defendant is indebted to plaintiff for this in the principal sum of \$10,200.00, with interest at 5 per cent from June 27, 1927.
3. That on September 15, 1926, McGrath bought ten \$1,000.00 Havana Electric Railway Company 5½ per cent bonds, defendant charging his account \$9,203.06. That on or about September 23, 1926, Ferguson, as agent of defendant, fraudulently and surreptitiously delivered to McGrath, in lieu thereof, ten interim receipts for subscription warrants, each warrant entitling the holder to subscribe for 23 shares of Havana Electric Railway Company common stock; that defendant is indebted to plaintiff for this in the principal sum of \$9,203.06, with interest at 5 per cent from June 6, 1928.

The cause was referred to a Master in Chancery of the court, who took and returned into court the evidence, with his conclusions of law and fact in the form of an original report and also an additional report. To both of these reports of the Master exceptions were heard. The Chancellor entered a decree in which he found the defendant, Robert Stevenson & Co., liable to the plaintiff on all but one of the nine transactions between the plaintiff and which the master had held the plaintiff entitled to recover, and entered a decree adjudging and decreeing that the defendant, Robert Stevenson & Co., Inc., pay to the plaintiff the sum we have above stated. The findings of the court, as to the transactions upon which the decree against the defendant is based, are substantially as follows:

"1. That on March 4, 1926, defendant sold to plaintiff 300 shares of Louisiana Oil Refining Company preferred stock, on which its account \$30,030.00; that thereafter its agent, Ferguson, fraudulently and surreptitiously delivered to plaintiff three temporary certificates, each for 100 shares of common stock in lieu of the preferred stock; that defendant is indebted to plaintiff for this in the principal sum of \$30,030.00, with interest thereon at 5 per cent from June 6, 1926.

"2. That on June 17, 1926, Ferguson, as agent of defendant, represented that the common stock of American Lumber Corporation had a market value of approximately \$21.00 per share, and induced plaintiff to give defendant an order for 200 shares of such stock, and thereafter delivered to him an interim receipt for the same; that defendant charged Mr. McGraw's account \$10,200.00 for such stock, it being, in fact, worthless at the time of purchase, which fact, however, was unknown to McGraw at the time; that defendant is indebted to plaintiff for this in the principal sum of \$10,200.00, with interest at 5 per cent from June 17, 1926.

"3. That on September 15, 1926, McGraw bought from plaintiff 50 shares of Havan Electric Railway Company 50 per cent bonds, defendant charging his account \$2,303.00. That on or about September 23, 1926, Ferguson, as agent of defendant, in lieu thereof, fraudulently and surreptitiously delivered to McGraw, in lieu thereof, ten interim receipts for subscription warrants, each warrant entitling the holder to subscribe for 25 shares of Havan Electric Railway Company common stock; that defendant is indebted to plaintiff for this in the principal sum of \$2,303.00, with interest at 5 per cent from June 6, 1926.

4. That on February 15, 1927, Ferguson induced McGrath to give Ferguson, as agent of defendant, an order for twenty-two \$1,000.00 Sookline 4 per cent first refunding mortgage gold bonds, due March 1, 1939; that defendant thereafter charged McGrath's account \$19,421.16 for the same; that on or about March 1, 1927, defendant, through its agent, Ferguson, fraudulently delivered to McGrath twenty-one bonds of Minneapolis and St. Louis Railroad Company, and also, on or about March 15, 1928, a twenty-second bond of Minneapolis and St. Louis Railroad Company, representing to McGrath that said bonds so delivered were genuine Soo Line bonds; that McGrath, relying upon the representations made, did not know that said bonds were not bonds of the Soo Line Railroad, but bonds which had been in default for some years, and which, at the time of delivery, had a value of approximately \$4,840.00; that defendant is indebted to plaintiff for this in the principal sum of \$19,421.16, with interest at 5 per cent from June 6, 1928.

5. That on or about March 5, 1927, Ferguson, as agent of defendant, induced McGrath to deliver five \$1,000.00, 5 per cent Aluminum Company of America bonds, of which he was then possessed, to said Ferguson, as agent of defendant, for the purpose of delivering the same to defendant to sell for the account of McGrath. That thereafter Ferguson, as agent of defendant, represented that said bonds were being held by defendant for McGrath's account; that defendant has failed to account for the same; that for this defendant is indebted to plaintiff in the principal sum of \$5,000.00, with interest on the same at 5 per cent from October 11, 1927.

6. That McGrath purchased from defendant 500 shares of preferred stock of Seaboard Airline, for which defendant charged his account \$25,125.14; that Ferguson, as agent of defendant, represented that said stock was being held by defendant for McGrath's account, and as collateral security for indebtedness then due from McGrath to defendant; that defendant has failed to deliver said stock to McGrath upon demand; that for this the defendant is indebted to plaintiff in the principal sum of \$25,125.14, with interest at 5 per cent from July 26, 1927.

7. That on or about December 20, 1927, Ferguson, as agent of defendant, induced McGrath to give defendant an order for 50 shares of common stock of Metal Door & Trim Company; that defendant thereafter charged the account of McGrath the sum of \$2,500.00 for the same; that said Ferguson falsely and fraudulently represented to McGrath that said stock was being held 'long' by defendant for McGrath's account; that defendant has refused to account for said stock; that for this the defendant is indebted to plaintiff in the principal sum of \$2,500.00, with interest at 5 per cent from December 20, 1927.

8. That McGrath purchased from defendant 200 shares of common stock of American Ice Company, for which defendant charged his account \$8,506.22; that Ferguson, as agent of defendant

4. That on February 15, 1937, Ferguson induced defendant to give Ferguson, as agent of defendant, an order for twenty-two \$1,000.00 bonds, one of which 1,1939; that defendant thereafter charged defendant's account \$3,191.16 for the same; that on or about March 1, 1937, defendant, through its agent, Ferguson, fraudulently delivered to defendant twenty-one bonds of Minneapolis and St. Louis, a twenty-Gomany, and also, on or about March 15, 1937, a twenty-second bond of Minneapolis and St. Louis, which defendant represented to defendant that said bonds so delivered were genuine 200 line bonds; that defendant, relying upon the representations made, did not know that said bonds were not bonds of the 200 line railroad, but bonds which had been in default for some years, and which, at the time of delivery, had a value of approximately \$3,300.00; that defendant is indebted to plaintiff for this in the principal sum of \$3,421.16, with interest at 5 per cent from June 8, 1938.

5. That on or about March 8, 1937, Ferguson, as agent of defendant, induced defendant to deliver five \$1,000.00 bonds to defendant's account of American bonds, of which one was then possessed, to said Ferguson, as agent of defendant, for the purpose of delivering the same to defendant to sell for the account of defendant. That thereafter Ferguson, as agent of defendant, represented that said bonds were being held by defendant for defendant's account; that defendant is liable to account for the same; that for this defendant is indebted to plaintiff in the principal sum of \$5,000.00, with interest on the same at 5 per cent from October 11, 1937.

6. That defendant purchased from defendant 500 shares of preferred stock of Pacific Airline, for which defendant exchanged his account \$3,191.16; that Ferguson, as agent of defendant, represented that said stock was being held by defendant for defendant's account, and as collateral security for indebtedness then due from defendant to defendant; that defendant has failed to deliver said stock to defendant as demanded; that for this defendant is indebted to plaintiff in the principal sum of \$3,191.16, with interest at 5 per cent from July 25, 1937.

7. That on or about December 30, 1937, Ferguson, as agent of defendant, induced defendant to give defendant an order for 50 shares of common stock of defendant's account; that defendant thereafter charged the account of defendant \$7,500.00 for the same; that said order was being fraudulently represented to defendant as being held 'long' by defendant for defendant's account; that defendant has refused to account for said stock; that for this defendant is indebted to plaintiff in the principal sum of \$7,500.00, with interest at 5 per cent from December 30, 1937.

8. That defendant purchased from defendant 500 shares of common stock of defendant's account; that Ferguson, as agent of defendant,

represented said stock to be held by defendant for McGrath's account as collateral security; that upon demand for the same defendant refused to deliver said stock to McGrath; that for this the defendant is indebted to plaintiff in the principal sum of \$7,295.22, with interest at 5 per cent from January 20, 1928."

No point is raised in this court as to the pleadings.

The defendant contends that the evidence is insufficient to support a finding of liability against defendant for the loss alleged to have been sustained by John P. McGrath in his lifetime.

The facts disclose that John P. McGrath, deceased, was a merchant tailor by trade; that in 1923, he began a series of transactions with the defendant, Robt. Stevenson & Co., Inc., involving the purchase and sale of securities through said defendant for his own private investment. All of his dealings with the defendant were carried on through Norman Ferguson, who was employed by the defendant at the time as a salesman, and who had originally solicited McGrath's business.

The defendant's business was principally that of underwriting and participating in the distribution and sale of new issues of securities, as distinguished from the ordinary brokerage house which deals largely in listed securities.

It appears that the defendant is not a member of any stock exchange, but it would as an accommodation for its regular investor customers, execute orders for the purchase and sale for their account of securities other than those which defendant had underwritten or in the original sale of which it was participating. These orders, however, were executed through some regular brokerage house engaged in the handling of listed securities.

Ferguson, whose actions are the subject of this controversy, was one of a dozen salesmen employed by defendant to solicit customers and secure orders for the securities owned by the defendant. While

represented said stock to be held by defendant for
McGraw's account as collateral security; that upon
demand for the same defendant refused to deliver said
stock to McGraw; that for this the defendant is indebted
to plaintiff in the principal sum of \$7,588.88, with
interest at 5 per cent from 1 day 30, 1937.

No point is raised in this court as to the date.

The defendant contends that the evidence is insufficient

to support a finding of liability against defendant for the loss

alleged to have been sustained by John P. McGraw in his lifetime.

The facts disclose that John P. McGraw, deceased, was a

merchant tailor by trade; that in 1923, he began a series of trans-

actions with the defendant, Rober Stevenson & Co., Inc., involving

the purchase and sale of securities through said defendant for his

own private investment. All of his dealings with the defendant were

carried on through Herman Ferguson, who was employed by the defendant

at the time as a salesman, and who had originally solicited McGraw's

business.

The defendant's business was principally that of under-

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of securities, as distinguished from the ordinary brokerage house

which deals largely in listed securities.

It appears that the defendant is not a member of any stock

exchange, but it would be an accommodation for its regular investor

customers, execute orders for the purchase and sale for their account

of securities other than those which defendant had undertaken to

in the original sale of which it was participating. These orders,

however, were executed through some regular broker or house engaged

in the handling of listed securities.

Ferguson, whose actions are the subject of this controversy,

was one of a dozen salesman employed by defendant to solicit customers

and secure orders for the securities owned by the defendant. While

acting as a salesman for the defendant, Ferguson first met McGrath, and some time in 1923 induced him to become one of defendant's customers. From 1923, until the close of McGrath's account with defendant in 1928, many transactions took place and appear in that account. There is evidence that Rodney Bliss, a witness for the defendant and its sales manager, gave as his opinion that the volume of business transacted with McGrath ran in excess of \$200,000.

The defendant seeks to establish from the facts in the record that the defendant's agent, who acted for the defendant as what is called a "customer's man", at one time was engaged in a joint enterprise with John P. McGrath, since deceased, and points to the fact that Mr. McGrath in his lifetime advised George A. Heimer, defendant's cashier in charge of the Accounting Department, he no longer wanted securities delivered by defendant's messenger boys, but wanted to have all future deliveries made through Ferguson, as Ferguson was handling his financial affairs. There is in the record, however, the evidence of Rodney M. Bliss, who was formerly connected with the defendant as sales manager, and in the course of his testimony he called attention to the fact that it was the usual practice to deliver securities by defendant's messenger boys, who were bonded, or by registered mail, or to give securities to the salesman to deliver in person.

The witness Heimer, testified on cross-examination that he asked Mr. Stevenson, who was president of the defendant company, whether or not it was o.k. for Ferguson to make deliveries and that Stevenson said that it was; that in making these deliveries, Ferguson was doing what otherwise a messenger would have done and that he was doing it with full knowledge and consent of Mr. Stevenson and himself.

acting as a salesman for the defendant, Ferguson first met McGraw, and some time in 1933 induced him to become one of defendant's customers. From 1933, until the close of McGraw's account with defendant in 1938, many transactions took place and appear in that account. There is evidence that Rodney Bliss, a witness for the defendant and its sales manager, gave as his opinion that the volume of business transacted with McGraw ran in excess of \$50,000. The defendant seeks to establish from the facts in the record that the defendant's agent, who acted for the defendant as what is called a "customer's man", at one time was engaged in a joint enterprise with John P. McGraw, since deceased, and points to the fact that Mr. McGraw in his lifetime advised George A. Reimer, defendant's cashier in charge of the accounting department, he no longer wanted securities delivered by defendant's messenger boys, but wanted to have all future deliveries made through Ferguson as Ferguson was handling his financial affairs. There is in the record, however, the evidence of Rodney M. Bliss, who was formerly connected with the defendant as sales manager, and in the course of his testimony he called attention to the fact that it was the usual practice to deliver securities by defendant's messenger boys, who were bonded, or by registered bill, or to give securities to the salesman to deliver in person.

The witness Reimer, testified on cross-examination that he asked Mr. Stevenson, who was president of the defendant company, whether or not it was O.K. for Ferguson to make deliveries and that Stevenson said that it was; that in making these deliveries, Ferguson was doing what otherwise a messenger would have done and that he was doing it with full knowledge and consent of Mr. Stevenson and himself.

The defendant contends that it is not liable to the plaintiff for the tortious acts of Ferguson while acting for both parties with their consent, in the absence of some showing that defendant participated in such acts as against the plaintiff, and this theory is based largely upon the fact that McGrath in his lifetime advised the defendant he no longer wanted securities delivered by defendant's messenger boys, but wanted to have all future deliveries of his securities made through Ferguson, and upon such advise Ferguson became the agent of McGrath.

It is well in this connection to consider the position Ferguson occupied when employed by the defendant as a solicitor for the purpose of selling securities which the defendant was underwriting, or in the issuance of which the defendant was participating, and the defendant's statements in support of the position that Ferguson was acting as the agent of McGrath in his transactions.

It appears from the testimony of Mr. Stevenson, president of the defendant company, that so far as he knew, no one else but Ferguson carried on McGrath's stock transactions, but his evidence is to the effect that this did not mean Ferguson handled everything having to do with McGrath's account.

It is quite apparent from this testimony of Stevenson's that Ferguson was in the employ and acting as the agent of the defendant and that he Stevenson had talked to McGrath over the telephone about his account being too speculative and the margin insufficient; that he must get it in proper shape and put up collateral or pay what he owed; that when Stevenson talked with Ferguson, the agent of the defendant, he was advised to get McGrath's account in proper shape, or McGrath would have to pay up what he owed; that Stevenson considered Ferguson the agent of the defendant in the matter of having the condition of McGrath's account improved.

The defendant contends that it is not liable to the plaintiff for the tortious acts of Ferguson while acting for both parties with their consent, in the absence of some showing that defendant participated in such acts as against the plaintiff, and this theory is based largely upon the fact that McGrath in his lifetime advised the defendant he no longer wanted securities delivered by defendant's messenger boys, but wanted to have all future deliveries of his securities made through Ferguson, and upon such advice Ferguson became the agent of McGrath.

It is well in this connection to consider the position Ferguson occupied when employed by the defendant as a solicitor for the purpose of selling securities which the defendant was underwriting, or in the issuance of which the defendant was participating, and the defendant's statements in support of the position that Ferguson was acting as the agent of McGrath in his transactions.

It appears from the testimony of Mr. Stevenson, President of the defendant company, that so far as he knew, no one else but Ferguson carried on McGrath's stock transactions, but his evidence is to the effect that this did not mean Ferguson handled everything having to do with McGrath's account.

It is quite apparent from this testimony of Stevenson that Ferguson was in the employ and acting as the agent of the defendant and that he Stevenson had talked to McGrath over the telephone about his account being too speculative and the margin insufficient; that he must get it in proper shape and put up collateral or pay what he owed; that when Stevenson talked with Ferguson, the agent of the defendant, he was advised to get McGrath's account in proper shape, or McGrath would have to pay up what he owed; that Stevenson considered Ferguson the agent of the defendant in the matter of having the condition of McGrath's account improved.

In order to establish the details of the account between the plaintiff and the defendant, Ferguson was called as a witness on behalf of the defendant, and in calling him as a witness, the defendant vouched for his credibility, and the defendant suggests that it does not wish to be understood as relying principally for its defense upon the details of Ferguson's testimony regarding the fictitious statements and their use to keep from Miss MacKenzie, who was secretary to McGrath, and others, the knowledge that he was engaged with McGrath in speculation away from the defendant company. It is also suggested by the defendant that even if Ferguson's story in all its particular details cannot be given credence, this would not mean he was not engaged in some sort of enterprise with McGrath incidental and foreign to his duties as defendant's sales agent.

During the course of the several transactions involved in this litigation, Ferguson remained as an agent in the employ of the defendant, and he remained with the defendant until he disappeared. The defendant knew that McGrath's securities were received by Ferguson to be delivered to McGrath, and as is admitted, the defendant delivered certain securities to McGrath through Ferguson, indicating he was empowered to act for the defendant in such deliveries.

It would be rather far fetched for this court to hold, by reason of the mere fact that McGrath authorized the defendant to deliver securities and defendant permitted one of its agents to deliver them to McGrath, that Ferguson acted as the agent of McGrath.

It seems shortly after Ferguson disappeared McGrath, accompanied by his secretary, Miss MacKenzie, called at the defendant's place of business to inquire as to the whereabouts of Ferguson, and revealed that his account was not as he claimed it should be. McGrath then made demand upon the defendant for certain specific items on which he charged a fraud had been committed, and thereafter

In order to establish the details of the account between the plaintiff and the defendant, Ferguson was called as a witness on behalf of the defendant, and in calling him as a witness, the defendant vouched for his credibility, and the defendant suggests that it does not wish to be understood as relying principally for its defense upon the details of Ferguson's testimony regarding the fictitious statements and their use to keep from Miss McKenna, who was secretary to McGrath, and others, the knowledge that he was engaged with McGrath in speculation away from the defendant company. It is also suggested by the defendant that even if Ferguson's story in all its particular details cannot be given credence, this would not mean he was not engaged in some sort of enterprise with McGrath incidental and foreign to his duties as defendant's sales agent. During the course of the several transactions involved in this litigation, Ferguson remained as an agent in the employ of the defendant, and he remained with the defendant until he disappeared. The defendant knew that McGrath's securities were received by Ferguson to be delivered to McGrath, and as it admitted, the defendant delivered certain securities to McGrath through Ferguson, indicating he was empowered to act for the defendant in such deliveries. It would be rather far fetched for this court to hold, by reason of the mere fact that McGrath authorized the defendant to deliver securities and defendant permitted one of its agents to deliver them to McGrath, that Ferguson acted as the agent of McGrath. It seems shortly after Ferguson disappeared McGrath, accompanied by his secretary, Miss McKenna, called at the defendant's place of business to inquire as to the whereabouts of Ferguson, and revealed that his account was not as he claimed it should be. McGrath then made demand upon the defendant for certain specific items on which he charged a fraud had been committed, and thereafter

tendered securities to the defendant, along with a demand for a rescission of the contracts involving the securities, and as a result this present litigation was instituted.

The evidence indicates that Ferguson as the agent of the defendant had free access to the books, as well as use of the stenographers for dictation relative to the defendant's business with McGrath. Considerable criticism is made by the defendant regarding the acceptance of statements of account which the defendant terms as fictitious. It is a fact that Stevenson, the president of the defendant company was aware that such statements of account were at least not correct or complete, for it appears that the statements were not regular monthly statements received by McGrath, but merely memorandums of transactions of his account sent to him prior to the defendant's institution of the practice of sending out monthly statements. By defendant's own admission, the duty of Ferguson as the agent of defendant was to secure orders for the purchase of securities owned by the defendant. The defendant as an accommodation for its regular investor customers executed orders with other brokers for the purchase and sale for their account of securities other than those which the defendant had underwritten or in the sale of which it was participating. In this connection the defendant would accept payment for securities purchased, and in the purchase of such securities Ferguson would execute orders as the agent of defendant for the purchase of securities for McGrath, which purchases amounted to and were in excess of \$200,000 a year. It seems hardly plausible, nor is the statement of Ferguson credible, that the questioned transactions were for the joint account of the witness and John P. McGrath.

The story of Ferguson is to the effect that he and McGrath were engaged in a joint trading enterprise with which defendant

tendered securities to the defendant, from which a demand for a
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defendant had free access to the books, as well as was of the
attorneys for distinction relative to the defendant's business
with Morris. Considerable criticism is made by the defendant regard-
ing the acceptance of statements of account which the defendant took
as fictitious. It is a fact that Stevenson, the president of the
defendant company, saw that such statements of account were
at least not correct or complete, for it appears that the statements
were not regular monthly statements received by Morris, but merely
memorandums of transactions of his account sent to him prior to the
defendant's institution of the practice of sending out monthly
statements. By defendant's own admission, the duty of Ferguson as
the agent of defendant was to secure orders for the purchase of
securities owned by the defendant. The defendant as an accommodation
for its regular investor customers executed orders with other brokers
for the purchase and sale for their account of securities other than
those which the defendant had underwritten or in the sale of which
it was participating. In this connection the defendant would accept
payment for securities purchased, and in the purchase of such securi-
ties Ferguson would execute orders on the agent of defendant for
the purchase of securities for Morris, which purchases amounted to
and were in excess of \$500,000 a year. It seems hardly possible,
nor is the statement of Ferguson credible, that the questioned
transactions were for the joint account of the witness and John F.
Morris. The story of Ferguson is to the effect that he and Morris
were engaged in a joint trading enterprise with which defendant

was not concerned and is based upon an alleged conversation he had with McGrath at about the time McGrath commenced dealing with the defendant, in the latter part of 1923. Ferguson testified that in his conversation he told McGrath there was an opportunity for him to make money in listed and in speculative securities and in what were called new issues. He further testified he told McGrath that the defendant was not a member of any Exchange and did not care for listed business and that it was not advisable to deal exclusively with the defendant, and that he, Ferguson, was in a position to make considerable money by trading away from the defendant but that he lacked finances.

Ferguson also testified that McGrath later told him to go ahead and see what he could do in making some extra money for them aside from his ordinary investment business and that when he, Ferguson, had something he should come back to see McGrath and he would put up the finances; that McGrath further told him that all of these transactions were to be on a fifty-fifty basis, McGrath to put up the securities to trade with and Ferguson to do the trading, they to divide the profits equally and assume the losses equally.

Ferguson further testified that he told McGrath he did not have the finances to assume the losses but that he did not expect there would be any. McGrath stated further that he did not care to have his speculative trading become known and that if he and Ferguson were to trade it was acceptable that it be done in McGrath's name. Ferguson told McGrath that he had a small account with Colvin & Co. and asked him if it was acceptable to him to trade in Ferguson's name, and McGrath stated it was.

It seems so unreasonable that McGrath would put up his securities for the purpose of these alleged trades, and thereby suffer the loss, if any, and in the event of a profit, divide on a fifty-fifty basis. It also seems improbable from the fact that

was not concerned and is based upon an alleged conversation he had with McGloth at about the time McGloth commenced dealing with the defendant, in the latter part of 1911. Ferguson testified that in his conversation he told McGloth there was an opportunity for him to make money in listed and in speculative securities and in what were called new issues. He further testified he told McGloth that the defendant was not a member of any exchange and did not care for listed business and that it was not advisable to deal exclusively with the defendant, and that he, Ferguson, was in a position to make considerable money by trading away from the defendant but that he lacked finances.

Ferguson also testified that McGloth later told him to go ahead and see what he could do in making some extra money for them aside from his ordinary investment business and that when he, Ferguson, had something he should come back to see McGloth and he would put up the finances; that McGloth further told him that all of these transactions were to be on a fifty-fifty basis, McGloth to put up the securities to trade with and Ferguson to do the trading; they to divide the profits equally and assume the losses equally. Ferguson further testified that he told McGloth he did not have the finances to assume the losses but that he did not expect there would be any. McGloth stated further that he did not want to have his speculative trading become known and that if he and Ferguson were to trade it was acceptable that it be done in McGloth's name. Ferguson told McGloth that he had a small account with United States and asked him if it was acceptable to him to trade in Ferguson's name and McGloth stated it was.

It seems so understood that McGloth would put up his securities for the purpose of these alleged trades, and thereby suffer the loss, if any, and in the event of a profit, divide on a fifty-fifty basis. It also seems inferrible from the fact that

McGrath dealt in listed securities with the defendant from 1923 to 1928; and in so doing was not obliged to share his profits in such purchases, nor make arrangement with one of defendant's employees to trade elsewhere, and bear all losses and share his profits.

This story is so absurd and improbable that this court, upon the face of the evidence, believes the finding of the court was right when in effect he concluded there was no such arrangement and no joint enterprise between McGrath and this witness Ferguson.

The items here in dispute and to which the defendant points as not being sustained by the proof, are based upon facts appearing in the record, and there is some discussion as to the proof being insufficient to justify the court's finding.

It appears that in the year 1926, Ferguson, then employed by the defendant, called at McGrath's office and stated he had purchased 300 shares of Louisiana Oil Refining Corporation Preferred stock for McGrath. McGrath asked him the price and he said it was around \$100 a share, and McGrath replied, "All right."

Subsequently, McGrath received, through the mail, a confirmation from the defendant of this purchase. A charge of \$30,030, was made on the books of the defendant corporation on March 4, 1926, against McGrath, as evidenced by the defendant's ledger sheet No. 24, and defendant's statement of account dated May 22, 1926. Subsequently the defendant delivered to McGrath, through Ferguson, shares of the Common stock of the Louisiana Oil Refining Corporation without nominal or par value, instead of the 300 shares of Preferred stock which had been purchased. Ferguson admits he delivered Common stock in lieu of the Preferred stock. When these certificates were delivered Miss MacKenzie glanced at them but did not detect the fraud, and placed them in the safe where they remained until after the fraud was discovered at the time of Ferguson's disappearance in March,

McGrath dealt in listed securities with the defendant from 1925 to 1928, and in so doing was not obliged to share his profits in such purchases, nor make arrangement with one of defendant's employees to trade elsewhere, and bear all losses and share his profits. This story is so absurd and improbable that the court, upon the face of the evidence, believes the finding of the court was right when in effect he concluded there was no such arrangement and no joint enterprise between McGrath and this witness Ferguson. The items here in dispute and to which the defendant points as not being sustained by the proof, are based upon facts appearing in the record, and there is some discussion as to the proof being insufficient to justify the court's finding. It appears that in the year 1926, Ferguson, then employed by the defendant, called at McGrath's office and stated he had purchased 300 shares of Louisiana Oil Refining Corporation for stock for McGrath. McGrath asked him the price and he said it was around 100 a share, and McGrath replied, "All right." Subsequently, McGrath received, through the mail, a confirmation from the defendant of this purchase. A check of \$30,000, was made on the books of the defendant corporation on March 4, 1926, against McGrath, as evidenced by the defendant's ledger sheet No. 24, and defendant's statement of account dated May 22, 1926. Subsequently the defendant delivered to McGrath, through Ferguson, shares of the common stock of the Louisiana Oil Refining Corporation without nominal or par value, instead of the 300 shares of preferred stock which had been purchased. Ferguson admits he delivered common stock in lieu of the preferred stock. When these certificates were delivered, the defendant placed them in the safe but did not deposit the same and placed them in the safe where they remained until after the trial was discovered at the time of Ferguson's disappearance in March

1928. Ferguson admits these Preferred stock certificates were delivered to him by his principal for delivery to McGrath. As a result of this transaction plaintiff holds, in lieu of certificates of Preferred stock for which McGrath paid \$30,030, certificates of Common stock having a stipulated value, on March 3, 1926, of not more than \$1,400.

The decree further found that McGrath purchased 200 shares of American Bosshardt Furnace Corporation stock, which was purchased upon the recommendation of Ferguson, who told McGrath that Colvin & Co. a brokerage house, was backing this concern and that the stock was selling at \$50 a share, and Ferguson further stated that his principal, the defendant, was participating in it and that he thought the defendant could get some of this stock for him at \$50 a share. McGrath told him it would be all right, if he would watch it. Thereafter, McGrath received, through the mail, a confirmation dated June 27, 1926, of the purchase of 200 shares of this stock at \$10,200. This confirmation, according to the testimony of Dorothy Veeder, an employee of Stevenson, Perry, Stacy & Co., was dictated in the office of Stevenson, Perry, Stacy & Co. to her by Ferguson in the ordinary course of business. Miss Veeder further testified she inquired of Mr. Bliss, who was then the Sales Manager of Robt. Stevenson & Co., Inc., and under whom Ferguson worked, whether it was necessary for Mr. Ferguson to call Mr. McGrath and confirm his sales. She testified Mr. Bliss replied that McGrath had numerous transactions there and that it was not necessary for Ferguson to call him, and that she did not call McGrath for confirmation.

Ferguson testified that the confirmation, which was testified to by Miss Veeder, was made up by himself, personally.

Thereafter, according to the testimony of Miss MacKenzie, the secretary for McGrath, he, McGrath, received what is known as

1928. Ferguson admits these preferred stock certificates were delivered to him by his principal for delivery to McGrath. As a result of this transaction plaintiff holds, in lieu of certificates of preferred stock for which McGrath paid \$30,000, certificates of common stock having a stipulated value, on March 3, 1928, of not more than \$1,400.

The decree further found that McGrath purchased 300 shares of American Boarding Furniture Corporation stock, which was purchased upon the recommendation of Ferguson, who told McGrath that Colvin & Co. a brokerage house, was backing this concern and that the stock was selling at \$50 a share, and Ferguson further stated that his principal, the defendant, was participating in it and that he thought the defendant could get some of this stock for him at \$50 a share. McGrath told him it would be all right, if he would watch it. Thereafter, McGrath received, through the mail, a confirmation dated June 27, 1928, of the purchase of 300 shares of this stock at \$50. This confirmation, according to the testimony of Dorothy Veeder, an employee of Stevenson, Perry, Stacy & Co., was dictated in the office of Stevenson, Perry, Stacy & Co. to her by Ferguson in the ordinary course of business. Miss Veeder further testified she inquired of Mr. Bliss, who was then the Sales Manager of Robt. Stevenson & Co., Inc., and under whom Ferguson worked, whether it was necessary for Mr. Ferguson to call Mr. McGrath and confirm his sales. The testimony of Mr. Bliss replied that McGrath had numerous transactions there and that it was not necessary for Ferguson to call him, and that she did not call McGrath for confirmation.

Ferguson testified that the confirmation, which was testified to by Miss Veeder, was made up by himself, personally. Thereafter, according to the testimony of Miss McGrath, the secretary for McGrath, Inc., McGrath received what is known as

a non-negotiable interim receipt for 200 shares of American Bosshardt Furnace Corporation. This purchase is also shown on defendant's statement dated October 19, 1926, it appearing as a debit in the sum of \$10,200. This statement indicates that this debit, together with the debit for the purchase of 300 shares of another security, was balanced by the sale of certain securities owned by McGrath and held "long" in the collateral account of the defendant, and thereafter disappeared from the account.

It was stipulated that this stock never had a value of \$51 per share but that at the time of the purchase of the security the stock was selling for \$20 and \$21 per share. The certificate was tendered to defendant and demand made for the return of the money paid for this security, which was refused.

As to another item, namely Havana Electric Railway Company Bonds, it appears that on August 10, 1926, Miss MacKenzie was present at a conversation in McGrath's office between McGrath, Ferguson and herself, in which Ferguson stated he had laid aside ten bonds of the Havana Electric Railway Company for McGrath. McGrath said he did not know anything about this company but that if Ferguson recommended these bonds he would take them. Subsequently a confirmation of this purchase and sale was received through the mail from Stevenson, Perry, Stacy & Co. on the printed form of the defendant, reciting that they confirm for delivery through Mr. Ferguson 11,000 par value bonds at the price of \$92 for a total of \$9,203.06. This purchase was also shown on the defendant's ledger sheet, and a charge of \$9,203.06 shows on defendant's statement dated October 1, 1926, Miss MacKenzie testified that instead of delivering bonds of the Havana Electric Railway Company, the defendant, through its agent Ferguson, delivered in September, 1926, instruments which were

a non-negotiable interim receipt for 100 shares of American Road & Transport Builders Corporation. This purchase is also shown on defendant's statement dated October 18, 1936, it appearing as a debit in the sum of \$10,200. This statement indicates that this debit, together with the debit for the purchase of 100 shares of another security, was balanced by the sale of certain securities owned by McGrath and held "long" in the collateral account of the defendant, and thereafter disappeared from the account.

It was stipulated that this stock never had a value of \$1 per share but that at the time of the purchase of the security the stock was selling for \$30 and \$21 per share. The certificate was tendered to defendant and demand made for the return of the same paid for this security, which was refused.

As to another item, namely Havana Electric Railway Company Bonds, it appears that on August 10, 1936, Miss MacKenzie was present at a conversation in McGrath's office between McGrath, Ferguson and herself, in which Ferguson stated he had laid aside ten bonds of the Havana Electric Railway Company for McGrath. McGrath said he did not know anything about this company but that if Ferguson recommended these bonds he would take them. Subsequently a confirmation of this purchase and sale was received through the mail from Stevenson, Terry, Stacy & Co. on the printed form of the defendant, reciting that they confirm for delivery through McGrath, Ferguson, 1,000 par value bonds at the price of \$20.203.08 for a total of \$20,203.08. This purchase was also shown on the defendant's ledger sheet, and a check of \$20,203.08 shown on defendant's statement dated October 1, 1936. Miss MacKenzie testified that instead of delivering bonds of the Havana Electric Railway Company, the defendant, through its agent Ferguson, delivered in September, 1936, instruments which were

subscription warrants for Common stock and which it is stipulated, were worthless. Ferguson admits that he delivered the worthless subscription warrants in lieu of bonds.

The defendant admits that the purchase of and charge for the security went through its books in John P. McGrath's account. It contends, however, in this instance, that the bonds were delivered, but to whom does not appear upon their ledger sheet, but the defendant produced a receipt for these bonds purporting to have been signed by John P. McGrath, by Anna V. MacKenzie, which Miss MacKenzie testified is a forgery. Ferguson admits that he signed this receipt and did so without Miss MacKenzie's authority. The result of this transaction was that McGrath was charged the sum of \$9,203.06 and received therefor worthless interim certificates.

A further item upon which there is a controversy is the purchase of Soo Line 4% First and Refunding Gold Mortgage Bonds. In the early part of 1927, she was present at a conversation between McGrath and Ferguson with reference to the purchase of these bonds. Ferguson said that he was going to buy some of these Soo Line bonds for McGrath, that they would be a good investment, and that the Canadian Pacific was back of it and there would be a nice premium in it, and that he had laid aside 21 bonds of a thousand dollars each. McGrath said he thought that was a good many, but Ferguson said it was such an excellent buy and recommended that he buy them all. McGrath consented. Thereafter, through the mail, in an envelope bearing the name of and on the printed form of the defendant, a confirmation dated February 15, 1927, confirming the sale by the defendant to McGrath of Soo Line 1st & Ref. 4% Gold bonds, "through Mr. Ferguson" was received. The charge recited in the confirmation was \$19,421.16.

subscription warrants for common stock and when it is stipulated, were worthless. Ferguson admits that he delivered the worthless subscription warrants in lieu of bonds.

The defendant admits that the purchase of such warrants for the security went through the book in John F. McGrath's account. It contends, however, in this instance, that the bonds were delivered but to whom does not appear upon their ledger sheet, but the defendant produced a receipt for these bonds purporting to have been signed by John F. McGrath, by Anna V. MacKenzie, which Miss MacKenzie testified is a forgery. Ferguson admits that he signed this receipt and did so without Miss MacKenzie's authority. The result of this transaction was that McGrath was charged the sum of \$2,500.00 and received therefor worthless interim certificates.

A further item upon which there is a controversy is the purchase of 200 line 41 First and National Gold Mortgage Bonds. In the early part of 1937, she was present at a conversation between McGrath and Ferguson with reference to the purchase of these bonds. Ferguson said that he was going to buy some of these 200 line bonds for McGrath, that they would be a good investment, and that the Canadian Pacific was back of it and there would be a good premium in it, and that he had laid aside 21 bonds of a thousand dollars each. McGrath said he thought that was a good story, but Ferguson said it was such an excellent buy and recommended that he buy them all. McGrath consented. Thereafter, through the well, in an envelope containing the name of and on the printed form of the document, a confirmation dated February 12, 1937, confirming the sale by the defendant to McGrath of 200 line 41 First and National Gold Mortgage Bonds, \$1,000.00 each, was received. The other receipt in the confirmation was \$1,000.00.

"Soo Line" bonds is the generally accepted name of bonds of the Minneapolis, St. Paul and Sault Ste. Marie Railroad Company. At the time of the purchase they had a value of approximately \$888½ per thousand dollar bond, which was approximately the charge recited in the confirmation. Instead of delivering bonds of the Minneapolis, St. Paul and Sault Ste. Marie Railroad Company, otherwise known as "Soo Line" bonds, defendant through its agent, Ferguson, delivered bonds of the Minneapolis and St. Louis Railroad Company. According to Miss MacKenzie's testimony, at the time the bonds were delivered, McGrath, Ferguson and herself were present. Ferguson handed the spurious Soo Line bonds to McGrath and said, "Here are your Soo Line bonds." The witness, Miss MacKenzie, counted them and found there were 21 and that the next coupon, which was due in September, was attached. In March, 1928, the witness testified she received the twenty-second bond, and at that time Ferguson said, "Here is your other Soo Line bond." The Minneapolis and St. Louis Railroad Company bonds were in default at the time they were delivered and no interest had been paid on them for seven years.

Miss MacKenzie testified that at the time of the delivery she did not know that bonds of the Minneapolis and St. Louis Railroad Company were not Soo Line bonds; that she did not know that bonds of the Minneapolis and St. Louis Railroad Company were in default with reference to the payment of interest, and that bonds of the Minneapolis and St. Louis Railroad Company were worth only a small fraction of what Soo Line bonds were worth.

Subsequent to the receipt of the spurious bonds plaintiff received a statement in an envelope of defendant, and on its printed form. This statement shows that McGrath's account was charged \$19,421.16, for the purchase of the alleged Soo Line bonds which debit was balanced by a sale of securities then held "long" in McGrath's "long" account, consisting of Federal Land Bank bonds in

"Soo Line" bonds is the generally accepted name of bonds of the Minneapolis, St. Paul and North Western Railway Company. At the time of the purchase they had a value of approximately \$884 per thousand dollar bond, which was approximately the same as testified in the confirmation. Instead of delivering bonds of the Minneapolis, St. Paul and North Western Railway Company, other- wise known as "Soo Line" bonds, defendant through his agent, Ferguson, delivered bonds of the Minneapolis and St. Louis Railroad Company. According to Miss MacKenzie's testimony, at the time the bonds were delivered, McGowan, Ferguson and several others were present. Ferguson handed the spurious Soo Line bonds to McGowan and said, "Here are your Soo Line bonds." The witness, Miss MacKenzie, counted them and found there were 11 and that the next morning, which was due in September, was attached. In March, 1918, the witness testified she received the twenty-second bond, and at that time Ferguson said, "Here is your other Soo Line bond." The Minneapolis and St. Louis Railroad Company bonds were delivered at the time the were delivered and no interest had been paid on them for seven years. Miss MacKenzie testified that at the time of the delivery she did not know that bonds of the Minneapolis and St. Louis Railroad Company were not Soo Line bonds; that she did not know that bonds of the Minneapolis and St. Louis Railroad Company were in default with reference to the payment of interest, and that bonds of the Minneapolis and St. Louis Railroad Company were worth only a small fraction of what Soo Line bonds were worth.

Subsequent to the receipt of the spurious bonds McGowan received a statement in an envelope of defendant, and on the enclosed form. This statement shows that McGowan's account was charged \$19,481.18, for the purchase of the alleged Soo Line bonds which debit was balanced by a sale of securities then held "long" in McGowan's "long" account, consisting of Federal Land Bank bonds in

the sum of \$15,826.35, Cities Service bonds in the sum of \$3,140, and a dividend on 300 shares of LouisianaOil Preferred in the sum of \$487.50, leaving a credit balance of \$32.74.

The ledger sheet shows that Federal Land Bank bonds were delivered "15,000 Federal Land Bank, Houston, 4½%, 7/1/56, (Signed) J. P. McGrath, Anna V. MacKenzie," which Miss MacKenzie testified was forged.

A further item relates to the Aluminum Co. bonds. Miss MacKenzie was also present at a conversation which took place in the year 1927 between McGrath and Ferguson, in which was discussed the matter of selling certain of McGrath's securities and reducing his debit balance with the defendant. McGrath gave Ferguson 5-\$1,000 Aluminum bonds to take over to defendant, sell, and apply the proceeds as a credit to McGrath's debit balance. Subsequent to the delivery of these bonds to the defendant, McGrath received through the mail statements of account dated March 15, 1927, and several statements thereafter. Each of these statements is on defendant's regular form and shows the Aluminum bonds being carried along in the collateral account.

Subsequently McGrath called Ferguson's attention to the fact that they had not sold the Aluminum bonds, and Ferguson said they were going "to hang on to them a little longer". McGrath said, "All right". A short time before Ferguson disappeared, McGrath said, "If you are not going to sell those Aluminum bonds, you better bring them back." Mr. Ferguson said, "All right; I think we can sell them any day on a good appreciation, but we will do as you say." The bonds were never returned to McGrath.

Another item appearing in the decree is that of 500 shares of Seaboard Air Line Preferred stock. The secretary of the late Mr. McGrath testified that he never received the stock in his lifetime. It appears however that on December 31, 1925, McGrath purchased 200

the sum of \$5,836.35, Cities Service bonds in the sum of \$3,140, and a dividend on 300 shares of Louisiana Oil preferred in the sum of \$487.50, leaving a credit balance of \$8,463.85.

The ledger sheet shows that Federal Land Bank bonds were delivered \$15,000 Federal Land Bank, Houston, 4 1/2%, 7/1/56, (Signed) J. P. McGrath, Anna V. Mackenzie, which was Mackenzie testified

was forged.

A further item relates to the Aluminum Co. bonds. Mackenzie was also present at a conversation which took place in the year 1937 between McGrath and Ferguson, in which was discussed the matter of selling certain of McGrath's securities and reducing his debit balance with the defendant. McGrath gave Ferguson \$5,000 Aluminum bonds to take over to defendant, sell, and apply the proceeds as a credit to McGrath's debit balance. Subsequent to the delivery of these bonds to the defendant, McGrath received through the mail statements of account dated March 15, 1937, and several statements thereafter. Each of these statements is on defendant's regular form and shows the Aluminum bonds being carried along in the collateral account.

Subsequently McGrath called Ferguson's attention to the fact that they had not sold the Aluminum bonds, and Ferguson said they were going "to hang on to them a little longer". McGrath said, "All right". A short time before Ferguson disappeared, McGrath said, "If you are not going to sell these Aluminum bonds, you better bring them back." Mr. Ferguson said, "All right; I think we can sell them any day on a good appreciation, but we will do as you say." The bonds were never returned to McGrath.

Another item appearing in the docket is that of 300 shares of Seaboard Air Line preferred stock. The secretary of the late W. McGrath testified that he never received the stock in his lifetime. It appears however that on December 31, 1935, McGrath purchased 300

shares of the Preferred Stock of Seaboard Air Line, as shown by defendant's ledger sheet, and defendant's statement dated January 1, 1926, showing a debit against McGrath's account of \$10,070.08.

On March 9, 1936 additional shares of Preferred Stock of this company were purchased from defendant for \$10,053.84. This also appears upon defendant's ledger sheet and also on the statement dated May 22, 1926, showing a debit charge against McGrath's account of \$10,053.84. On March 1, 1927, McGrath received 100 shares of this security by transfer from the account of J. P. McGrath, as shown by the ledger sheet for which McGrath's account was charged \$5,001.22. According to the evidence this stock was never received by McGrath. It does appear that 500 shares of the Seaboard Air Line Preferred stock was delivered out of the defendant's office under date of July 26, 1927, but to whom delivered does not appear in the record.

Ferguson, the witness offered by the defendant, admits, however, that 200 shares of this stock, which are in dispute, were withdrawn from the defendant by him. He testified, however, that he delivered them secretly to McGrath and that McGrath later turned them over to him to deposit in their so-called joint account. It also appears that after Ferguson disappeared McGrath requested the return of this stock from the defendant and was informed that they did not have it; that it had been sold a long time ago. The decree found that plaintiff was entitled to the return of the price paid for this stock, which was \$25,124.14. In plaintiff's brief she erred in stating the court's finding to be \$10,053 plus interest. The decree entered by the court fixed the total amount due from the defendant for this item at \$25,124.14.

A further finding by the court was with regard to the Metal Door and Trim Company transaction. It appears from the evidence that on March 19, 1926, McGrath purchased 300 shares of Preferred

shares of the Preferred Stock of Woodward Air Line, as shown by defendant's ledger sheet, and defendant's statement dated January 1, 1936, showing a debit against McGrath's account of \$10,053.84. On March 9, 1936 additional shares of Preferred Stock of this company were purchased from defendant for \$10,053.84. This also appears upon defendant's ledger sheet and also on the statement dated May 31, 1936, showing a debit charge against McGrath's account of \$10,053.84. On March 1, 1937, McGrath received 100 shares of this security by transfer from the account of J. P. McGrath, as shown by the ledger sheet for which McGrath's account was charged \$2,001.32. According to the evidence this stock was never received by McGrath. It does appear that 300 shares of the Woodward Air Line Preferred stock was delivered out of the defendant's office under date of July 28, 1937, but to whom delivered does not appear in the record.

Ferguson, the witness offered by the defendant, admits, however, that 300 shares of this stock, which are in dispute, were withdrawn from the defendant by him. He testified, however, that he delivered them secretly to McGrath and that McGrath later turned them over to him to deposit in their so-called joint account. It also appears that after Ferguson discovered McGrath requested the return of this stock from the defendant and was informed that they did not have it; that it had been sold a long time ago. The doctor found that plaintiff was entitled to the return of the price paid for this stock, which was \$5,134.14. In plaintiff's brief she exerted in stating the court's finding to be \$10,053 plus interest. The decree entered by the court fixed the total amount due from the defendant for this item at \$5,134.14.

A further finding by the court was with regard to the Metal Door and Trim Company transaction. It appears from the evidence that on March 19, 1935, McGrath purchased 300 shares of Preferred

and 150 shares of Common stock of this company for \$16,840.84. This stock was delivered on August 18, 1926, and the ledger shows that on October 15, 1926, these 300 shares of Preferred and 150 shares of Common stock were received by defendant and subsequently, on April 26, 1928, sold for \$16,796.84 and McGrath credited therefor. As to these items there is no complaint by the plaintiff. However, on January 1, 1928, the statement of this date shows a purchase of 50 shares of Metal Door and Trim Company stock for \$2,500 and a debit against McGrath's account for this amount. The evidence indicates that Ferguson advised McGrath to make this purchase, but that McGrath never received the 50 shares. This stock is shown "long" on statement dated January 1, 1928, and on statement of March 1, 1928. Demand was made for the return of this stock after Ferguson's disappearance but McGrath was informed that defendant did not have and never had had this stock. As a result of this transaction, McGrath was defrauded of the purchase price of the stock, which was \$2,500.

As to the item of American Ice Company, it appears from the finding of the decree that McGrath purchased 200 shares of the common stock on April 7, 1927, for \$26,006.22, which appears as a debit against McGrath on defendant's statement of May 1, 1927, and the purchase of this stock shows on defendant's ledger sheet. The plaintiff admits that there is no question of the purchase of 200 shares of this security, after which the stock was split four for one and the 800 shares resulting from this split were shown on all ledger sheets and statements received by McGrath from the defendant up to and including December 1, 1927. The ledger sheet shows delivery of 300 shares of American Ice Company on December 27, 1927, for \$9,000. The account is credited with \$9,000, and the 200 shares were released.

No complaint is made by the plaintiff as to 600 shares of the 800 split shares. However, the ledger sheet shows delivery of

and 150 shares of Common stock of this company for \$1,840.84. This stock was delivered on August 14, 1936, and the ledger shows that on October 15, 1936, these 300 shares of preferred and 150 shares of Common stock were received by defendant and subsequently, on April 1, 1937, sold for \$18,798.84 and Northern credited therefor. As to these items there is no complaint by the plaintiff. However, on January 1, 1938, the statement of this date shows a purchase of 50 shares of Metal Door and Trim Company stock for \$3,000 and a debit against McGrath's account for this amount. The evidence indicates that Ferguson advised McGrath to make this purchase, but that McGrath never received the 50 shares. This stock is shown "long" on statement dated January 1, 1938, and on statement of March 1, 1938. No account was made for the return of this stock after Ferguson's disappearance but McGrath was informed that defendant did not have and never had had this stock. As a result of this transaction, McGrath was defrauded of the purchase price of the stock, which was \$3,000. As to the item of American Ice Company, it appears from the finding of the decree that McGrath purchased 300 shares of the common stock on April 7, 1937, for \$28,000.00, which appears as a debit against McGrath on defendant's statement of May 1, 1937, and the purchase of this stock shows on defendant's ledger sheet. The plaintiff admits that there is no question of the purchase of 300 shares of this security, after which the stock was split four for one and the 300 shares resulting from this split were shown on all ledger sheets and statements received by McGrath from the defendant up to and including December 1, 1937. The ledger sheet shows delivery of 300 shares of American Ice Company on December 17, 1937, for \$3,000. The account is credited with \$3,000, and the 300 shares were released. No complaint is made by the plaintiff as to 300 shares of the 300 split shares. However, the ledger sheet shows delivery of

the remaining 200 shares of this stock on January 20, 1928. The defendant offered a receipt for these 200 shares, signed "John P. McGrath." From the evidence, this receipt is a forgery, and the further fact is McGrath never received this stock.

Ferguson by his evidence admits he signed McGrath's name to the receipt for 200 shares which were withdrawn from the defendant. From his evidence he claims he had McGrath's authority to withdraw the stock, and that the stock was deposited by him in the so-called joint account with McGrath's knowledge and consent. The amount found due on this item was \$7,295.22, plus interest.

The court further found as a result of the accounting that the total amount due from the defendant to the plaintiff is \$149,287.05, including interest, as follows:

2/15/27	To Minneapolis, St. Paul and Saulte Ste. Marie Railroad Bonds	\$19,421.16
	To interest on same at 5%	
	6/6/28 to 7/11/35	6,892.86
3/9/26	To Havana Electric Railway Bonds	9,203.06
	To interest on same at 5%	
	from 6/6/28 to 7/11/35	3,265.78
12/20/27	To Metal Door and Trim Company stock	2,500.00
	To interest on same at 5%	
	from 12/20/27 to 7/11/35	944.79
3/4/26	To Louisiana Oil Refining Corp. stock	30,030.00
	To interest on same at 5%	
	from 6/6/28 to 7/11/35	10,647.42
6/27/26	To 200 shares American Boeshardt Furnace Corporation	10,200.00
	To interest on same at 5%,	
	from 6/27/27 to 7/11/35	4,099.83
10/11/27	To 5 bonds, Aluminum Co. of America	5,000.00
	To interest on same at 5%	
	from 10/11/27 to 7/11/35	1,937.50
4/7/27	To 200 shares American Ice Co.	
	less amounts received from same	7,295.22
	To interest on same at 5%	
	from 1/20/28 to 7/11/35	2,726.60

the remaining 300 shares of this stock on January 21, 1938. The defendant offered a receipt for the 300 shares, signed "John F. McGrath." From the evidence, this receipt is a forgery, and the further fact is McGrath never received this stock.

Terguson by his evidence admits he signed McGrath's name to the receipt for 300 shares which were withdrawn from the defendant from his evidence he claims he had McGrath's authority to withdraw the stock, and that the stock was delivered by him in the so-called joint account with McGrath's knowledge and consent. The amount owed due on this item was \$7,382.32, plus interest.

The court further found as a result of the accounting that the total amount due from the defendant to the plaintiff is \$142,287.05, including interest, as follows:

2/15/37	To Minneapolis, St. Paul and Northern P.A.	13,431.10
	Marie Railroad Bonds	
	To interest on same at 5%	8,482.84
6/6/38 to 7/11/38		
3/3/38	To Havana Electric Railway Bonds	5,101.00
	To interest on same at 5%	2,165.75
6/6/38 to 7/11/38		
12/30/37	To Metal Door and Trim Company stock	2,400.00
	To interest on same at 5%	144.75
from 12/30/37 to 7/11/38		
3/4/38	To Louisiana Oil Refining Corp. stock	30,000.00
	To interest on same at 5%	10,647.44
from 6/6/38 to 7/11/38		
6/27/38	To 300 shares American Boarding House Corporation	10,000.00
	To interest on same at 5%	4,092.83
from 6/27/37 to 7/11/38		
10/11/37	To 5 bonds, Aluminum Co. of America	5,000.00
	To interest on same at 5%	1,427.50
from 10/11/37 to 7/11/38		
4/7/37	To 300 shares American Ice Co.	7,382.32
	Less amounts received from same	
	To interest on same at 5%	2,782.50
from 1/30/38 to 7/11/38		

12/31/25	To 200 shares Preferred stock of Seaboard Air Line	\$ 10,070.08
	To interest on same at 5% from 7/26/27 to 7/11/35	4,007.02
3/9/26	To 200 shares Preferred stock of Seaboard Air Line	10,053.84
	To interest on same at 5% from 7/26/27 to 7/11/35	4,000.59
3/1/27	To 100 shares Preferred stock of Seaboard Air Line	5,001.22
	To interest on same at 5% from 7/26/27 to 7/11/35	<u>1,990.08</u>
	Total -	\$149,287.05

From an examination of the facts, there is evidence to support the various findings by the court included in the decree. The defendant contends, however, as heretofore stated in this opinion, that the evidence is insufficient to support a finding of liability against the defendant. We are unable to agree with this contention, as we believe from the facts and the manifest weight of the evidence the court was justified in entering the decree finding as it did.

It is apparent from the whole record that the witness Ferguson, who was employed by the defendant and not by McGrath in his lifetime, was guilty of conversion and of having acted for and on behalf of the defendant in this case, and the defendant as principal is liable. One of the cases cited by the plaintiff is Edwards v. Dooley, 120 N. Y. 540, and the defendant has adopted certain language therein contained as being helpful in the decision of this case, which is as follows:

"While a principal is bound by his agent's acts when he justifies a party dealing with his agent in believing that he has given to the agent authority to do those acts, he is responsible only for that appearance of authority which is caused by himself, and not for that appearance of conformity to the authority which is caused only by the agent. * * *

For the appearance of authority he is responsible only so far as he has caused that appearance. For the appearance of the act the agent alone is responsible. The fundamental proposition is that one man can be bound only by

12/31/35	To 200 shares Preferred stock of Seaboard Air Line To interest on same at 5% from 7/26/27 to 7/11/35	10,000.00
3/8/28	To 200 shares Preferred stock of Seaboard Air Line To interest on same at 5% from 7/26/27 to 7/11/35	10,000.00
3/1/27	To 100 shares Preferred stock of Seaboard Air Line To interest on same at 5% from 7/26/27 to 7/11/35	5,000.00
	Total -	148,227.00

From an examination of the facts, there is evidence to support the various findings by the court included in the decree. The defendant contends, however, as heretofore stated in this opinion that the evidence is insufficient to support a finding of liability against the defendant. We are unable to agree with this contention, as we believe from the facts and the manifest weight of the evidence the court was justified in entering the decree finding as it did. It is apparent from the whole record that the witness Ferguson, who was employed by the defendant and not by itself in his lifetime, was guilty of conversion and of having acted for and on behalf of the defendant in this case, and the defendant is principal is liable. One of the cases cited by the plaintiff is Edwards v. Doolley, 130 N. Y. 240, and the defendant has sought certain language therein contained as being helpful in the decision of this case, which is as follows:

"While a principal is bound by his agent's acts when he justifies a party dealing with his agent in believing that he has given to the agent authority to act in those acts, he is responsible only for the consequences of authority which is caused by himself, and not for the consequences of conformity to the authority which is caused only by the agent."

For the appearance of authority he is responsible only so far as he has caused that appearance. For the appearance of the agent alone is responsible. The fundamental proposition is that one can be bound only by

the authorized acts of another. He cannot be charged because another holds a commission from him and falsely asserts that his acts are within it."

We quite agree with the reasoning of the New York court that the principal cannot be bound by the acts of the agent where the agent creates the appearance of authority. However, in this case it is clear from the record that Ferguson, in carrying out the acts indicated in this opinion, did so as the agent of the defendant without himself creating the appearance of such authority, but at the direction of the defendant.

We believe that the court was fully justified in entering the decree, and it is our duty from the conclusion we have reached to affirm the decree. Accordingly the decree is affirmed.

DECREE AFFIRMED.

DENIS E. SULLIVAN, P.J. AND HALL, J. CONCUR.

the authorized acts of another. He cannot be charged because another holds a commission from him and falsely asserts that his acts are within it."

The court agrees with the reasoning of the New York court that the principal cannot be bound by the acts of the agent where the agent creates the appearance of authority. However, in this case it is clear from the record that Ferguson, in carrying out the acts indicated in this opinion, did so as the agent of the defendant without himself creating the appearance of such authority, but at the direction of the defendant.

We believe that the court was fully justified in

entering the decree, and it is our duty from the opinion to have reached to affirm the decree. Accordingly the decree is affirmed.

DECEMBER AFFIRMED.

DEWIS E. SULLIVAN, P. J. AND HALL, J. CONCUR.

38702

NICHOLAS TATE for the use of Regal Radio
Manufacturing Company, Inc., a corporation,

APPEAL FROM

(Plaintiff) Appellant,

v.

DANIEL BURKHARTSMEIER COOPERAGE COMPANY,
a corporation,

MUNICIPAL COURT

OF CHICAGO.

(Defendant) Appellee.

287 I.A. 627¹

MR. JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT.

This is an appeal by the plaintiff from a judgment entered for the defendant in a suit instituted in the Municipal Court of Chicago upon an assignment of wages brought in the name of Nicholas Tate, the assignor, for the use of Regal Radio Manufacturing Company, Inc., a corporation, the assignee, against Daniel Burkhartsmeier Cooperage Company, a corporation, Tate's employer.

A trial was had before the court, and at the close of plaintiff's case the defendant made a motion to find the issues for the defendant, which motion was sustained, and thereupon judgment was entered on the finding against the plaintiff.

From the facts as we have them before us, it appears that on the 24th day of November, 1934, the Regal Radio Manufacturing Company, the plaintiff, was actively engaged in business in the City of Chicago, and that on the 24th day of November, 1934, Nicholas Tate, the nominal plaintiff and assignor herein, and Leona Tate, his wife, executed and delivered to the plaintiff their certain judgment note and that as security for the payment of said note, on the same day, November 24, 1934, Nicholas Tate, executed and delivered to the plaintiff an assignment of wages, and at the time of the delivery of the assignment of wages by Nicholas Tate there were certain blanks in the printed form of assignment which had not been filled in at the time Nicholas Tate signed the document, but the blanks were

NICHOLAS T. for the use of Radio Radio
Manufacturing Company, Inc., a corporation,

(Plaintiff) Answer,

v.

DANIEL BURKHARTMAN COOPERAGE COMPANY,
a corporation,

(Defendant) Appellee.

287 I.A. 627

MR. JUSTICE HARRIS DELIVERED THE OPINION OF THE COURT.

This is an appeal by the plaintiff from a judgment entered for the defendant in a suit instituted in the Municipal Court of Chicago upon an assignment of wages brought in the name of Nicholas Tate, the assignor, for the use of Radio Radio Manufacturing Company, Inc., a corporation, the assignee, against Daniel Burkhardtman Cooperage Company, a corporation, Tate's employer. A trial was had before the court, and at the close of plaintiff's case the defendant made a motion to find the issues for the defendant, which motion was sustained, and thereupon judgment was entered on the finding against the plaintiff. From the facts as we have them before us, it appears that on the 24th day of November, 1934, the Radio Radio Manufacturing Company, the plaintiff, was actively engaged in business in the City of Chicago, and that on the 24th day of November, 1934, Nicholas Tate, the nominal plaintiff and assignor herein, and Leon Tate, his wife, executed and delivered to the plaintiff their joint and several note and that as security for the payment of said note, on the same day, November 24, 1934, Nicholas Tate, executed and delivered to the plaintiff an assignment of wages, and at the time of the delivery of the assignment of wages by Nicholas Tate there were certain blanks in the printed form of assignment which had not been filled in at the time Nicholas Tate signed the document, but the blanks were

subsequently filled in on a typewriter under the supervision and direction of the president of the plaintiff company on the same day that Nicholas Tate delivered the assignment of wages to the plaintiff, but after Nicholas Tate left the plaintiff's office.

It further appears that Nicholas Tate was in the employ of the defendant company on the 24th day of November, 1934, and that he remained continuously in the employ of the defendant up to and including the 17th day of June, 1935; that on the 24th day of April, 1935, a notice of assignment was served on the defendant company relative to the wages of Nicholas Tate, and that from the 24th day of April, 1935, to the 17th day of June, 1935, Nicholas Tate, the assignor, earned while in the employ of the defendant company the sum of \$110.

The important question involved in this case is whether the alteration of the contract signed by Nicholas Tate was such as would invalidate its terms and preclude the plaintiff from recovery thereon.

From the evidence it would appear that the alteration on the face of the assignment was made on a typewriter by inserting in the blank spaces of this printed form of assignment the name of the defendant, Daniel Burkhartsmeier Cooperage Company, and that the assignment of wages, commissions, claims and demands due from this company to Nicholas Tate was to extend up to and including the last day of October, 1936.

There is no evidence in the record which would tend to show that there was any understanding between the parties that this alteration should be made, nor the obligation that the assignment was to run for the period indicated in the contract.

subsequently filled in on a typewriter under the supervision and direction of the president of the plaintiff company on the same day that Nicholas Tate delivered the assignment of wages to the plaintiff but after Nicholas Tate left the plaintiff's office.

It further appears that Nicholas Tate was in the employ of the defendant company on the 24th day of November, 1934, and that he remained continuously in the employ of the defendant up to and including the 17th day of June, 1935; that on the 24th day of April, 1935, a notice of assignment was served on the defendant company relative to the wages of Nicholas Tate, and that from the 24th day of April, 1935, to the 17th day of June, 1935, Nicholas Tate the assignor, earned while in the employ of the defendant company the sum of \$110.

The important question involved in this case is whether the alteration of the contract signed by Nicholas Tate was such as would invalidate its terms and preclude the plaintiff from recovery thereon.

From the evidence it would appear that the alteration on the face of the assignment was made on a typewriter by inserting in the blank spaces of this printed form of assignment the name of the defendant, Daniel Burkhardt & Company, and that the assignment of wages, commissions, claims and demands due from this company to Nicholas Tate was to extend up to and including the last day of October, 1935.

There is no evidence in the record which would tend to show that there was any understanding between the parties that this alteration should be made, nor the obligation that the assignment was to run for the period indicated in the contract.

Upon this question the case of Hayes v. Wagner, 220 Ill. 256, has been called to our attention. This was an action in assumpsit for damages alleged to have resulted from the failure of the defendants to allow the plaintiff to perform a contract. The contract was altered by changing the amount to be paid for the work to be done from \$52,000 to \$54,600, changing the date of the completion of the work, and making other alterations in the contract. The court in that case said:

"A material alteration of an executory written contract destroys it as a basis of recovery by the person making the alteration, and the changes in this contract invalidated it as against the defendant, who did not consent to such changes. No recovery could be had upon the contract, either in its altered form or in its original condition, and it was wholly void."

In the case of Gillett et al v. Sweat, 1 Gilman, (6 Ill.) 475, the court said:

"So, if on the production of an instrument in Court, it appears to have been altered, it is incumbent on the party offering it in evidence to explain this appearance. 1 Greenl. Ev. 599, sec. 564. Every such alteration detracts from the credit of the instrument, and renders it suspicious, and this suspicion, the party producing it must remove."

The court further said:

"We need not cite authorities to prove, that any material alteration of a note, by which any of the parties to it, would be prejudiced, or where its terms are changed, so as to alter the relative liabilities of the parties, will destroy the legal effect of the entire instrument. And it was for the jury to judge, whether such an alteration had been made in this respect, or not."

See also Benjamin v. McConnell, 4 Gilman (9 Ill.) 536.

Upon the burden of proof, it was incumbent upon the plaintiff to show an authority or consent of Nicholas Tate to the interpolations if it wished to recover on this instrument. This rule was commented upon in the case of Merritt v. Dewey, 218 Ill. 599, It was there said:

"When the defendant had introduced evidence showing a material alteration the burden of proof then shifted to the plaintiff, and it was for him then (where he did not meet such evidence

Upon this motion the case of Hayes v. Hayes, 250 Ill.

356, has been called to our attention. This was an action in

assumpsit for damages alleged to have resulted from the failure of

the defendants to allow the plaintiff to perform a contract. The

contract was altered by changing the amount to be paid for the work

to be done from \$23,000 to \$24,200, changing the date of the

completion of the work, and making other alterations in the contract.

The court in that case said:

"A material alteration of an executory written contract destroys it as a basis of recovery of the person making the alteration, and the changes in this contract invalidated it as against the defendant, who did not consent to such changes. No recovery could be had upon the contract, either in its altered form or in its original condition, and it was wholly void."

In the case of Gillett et al. v. Hunt, 1 Gilman, 6 Ill.

475, the court said:

"So, if on the production of an instrument in court, it appears to have been altered, it is incompetent on the party offering it in evidence to explain this appearance. Green v. Green, 504, see 504. Every such alteration destroys from the credit of the instrument, and renders it suspicious, and this suspicion, the party producing it must remove."

The court further said:

"We need not cite authorities to prove, that any material alteration of a note, by which any of the parties to it, would be prejudiced, or where its terms are changed, so as to alter the relative liabilities of the parties, will destroy the legal effect of the entire instrument. And it was for the jury to judge, whether such an alteration had been made in this respect or not."

See also Benjamin v. McDonnell, 4 Gilman (3 Ill.) 583.

Upon the burden of proof, it was incumbent upon the plaintiff

to show an authority or consent of Nicholas to the interpolation

if it wished to recover on this instrument. This rule was commented

upon in the case of Merritt v. Merritt, 218 Ill. 599. It was there said

"When the defendant had introduced evidence showing a material alteration the burden of proof then shifted to the plaintiff, and it was for him then (where he did not meet such evidence

by denial} to show that such alteration had been made under circumstances rendering it lawful or under circumstances which, would not preclude a recovery by him." (Citing cases)

See also Eggmann v. Nutter, 155 Ill. App. 390.

It is apparent from the record that the evidence is silent upon the authority of the Regal Radio Manufacturing Company, Inc. to interpolate the words we regard as material in this assignment of wages, which form was in blank at the time it was signed by Nicholas Tate, the assignor.

To the contention upon the question of alteration, the Radio Company has cited the case of White v. Alward, 35 Ill. App. 195, where the court said:

"But this is not a case of alteration; the spaces were wholly blank and the delivery of commercial paper in that condition is authority to the holder to fill the blanks. Tiedeman on Com. Paper, Sec. 283; 1 Dan. Neg. Ins., Sec. 142; 1 Pars. B. & N. 33.

Nor is the execution of such authority confined to commercial paper. Bish. Con., Sec. 1174; Jewell v. Rock River Co., 101 Ill. 57."

The question of the authority to alter an instrument or to fill in the blanks is a question of fact. The record is not clear upon the question of Tate's authorizing the plaintiff to fill in the blanks in the manner in which it did, or that he waived the interpolation in the contract.

There is nothing in the facts submitted in this case to the trial court which would indicate that the authority to fill in the blank spaces was given by Tate to the plaintiff. As a matter of fact, the record does not disclose any evidence from which we would be justified in holding that the interpolations were authorized by Tate, the assignor.

For the reasons stated, the judgment of the trial court is affirmed.

JUDGMENT AFFIRMED.

DENIS E. SULLIVAN, P.J. AND HALL, J. CONCUR.

by denial, to show that such alteration had been made under circumstances rendering it lawful or under circumstances which would not preclude a recovery by him." (Sitting cases)

See also Barman v. Mutter, 153 Ill. App. 250.

It is apparent from the record that the evidence is silent upon the authority of the legal Radio Manufacturing Company, Inc. to interpolate the words we regard as material in this assignment of wages, which form was in blank at the time it was signed by Nicholas Tate, the assignor.

To the contention upon the question of alteration, the Radio Company has cited the case of White v. White, 75 Ill. App. 12

where the court said:
"But this is not a case of alteration; the spaces were wholly blank and the delivery of commercial paper in that condition is authority to the holder to fill the places. Tiedman on Com. Paper, Sec. 383; 1 Dan. Neg. Ins., Sec. 143; 1 Pere. B. & N. 35.
Nor is the execution of such authority confined to commercial paper. Blah. Com., Sec. 1154; Jewell v. Cook River Co., 101 Ill. 87."

The question of the authority to alter an instrument or to fill in the blanks is a question of fact. The record is not silent upon the question of Tate's authorizing the plaintiff to fill in the blanks in the manner in which it did, or that he received the interpolation in the contract.

There is nothing in the facts submitted in this case to the trial court which would indicate that the authority to fill in the blank spaces was given by Tate to the plaintiff. As a matter of fact the record does not disclose any evidence from which we could be justified in holding that the interpolations were authorized by Tate.

the assignor.
For the reasons stated, the judgment of the trial court is affirmed.

JUDGMENT AFFIRMED.

38419

CHICAGO TITLE & TRUST COMPANY,
a corporation, as successor
trustee,

Appellant,

v.

GERTRUDE BLANKSTEN and SAMUEL
BLANKSTEN, her husband, and
A. E. COHEN et al.,

Appellees.

76
APPEAL FROM SUPERIOR
COURT, COOK COUNTY.

287 I.A. 627²

MR. PRESIDING JUSTICE SULLIVAN
DELIVERED THE OPINION OF THE COURT.

This appeal seeks to reverse a decree of the superior court entered July 18, 1934, upon the intervening petition of A. E. Cohen, filed May 17, 1934. The bill of complaint filed by plaintiff, Chicago Title & Trust Company (hereinafter referred to as the trustee) February 13, 1932, alleged, substantially, that it was the successor in trust under a trust deed securing a series of bonds aggregating \$32,000; that Gertrude Blanksten and Samuel Blanksten, her husband, and Benjamin Weisberg and Bessie Weisberg, his wife, being indebted in the amount of said bond issue and to secure the payment of same, had conveyed certain real estate in Chicago by said trust deed; that certain defaults had occurred in the payment of principal, interest and taxes and that the successor trustee had accelerated the full amount of the balance due under the trust deed; and prayed for an accounting and for a decree of foreclosure and sale.

April 27, 1934, a decree of foreclosure and sale was entered wherein the court found that all the allegations in the bill of complaint had been proven and directed that the property

CHICAGO TITLE & TRUST COMPANY,
a corporation, as successor
trustee,

Appellant,

v.

GERTRUDE BLANKSTEN and SAMUEL
BLANKSTEN, her husband, and
A. H. COHEN et al.,
Appellees.

APPEAL FROM SUPERIOR

COURT, COOK COUNTY.

387 I.A. 627

MR. PRESIDING JUSTICE SULLIVAN
DELIVERED THE OPINION OF THE COURT.

This appeal seeks to reverse a decree of the superior

court entered July 18, 1934, upon the intervening petition of
A. H. Cohen, filed May 17, 1934. The bill of complaint filed by
plaintiff, Chicago Title & Trust Company (hereinafter referred

to as the trustee) February 13, 1932, alleged, substantially,

that it was the successor in trust under a trust deed securing
a series of bonds aggregating \$2,000; that Gertrude Blanksten

and Samuel Blanksten, her husband, and Benjamin Leiberg and

Beaie Leiberg, his wife, being indebted in the amount of said

bond issue and to secure the payment of same, had conveyed certain

real estate in Chicago by said trust deed; that certain defaults

had occurred in the payment of principal, interest and taxes and

that the successor trustee had accelerated the full amount of the

balance due under the trust deed; and prayed for an accounting

and for a decree of foreclosure and sale.

April 27, 1934, a decree of foreclosure and sale was

entered wherein the court found that all the allegations in the

bill of complaint had been proven and directed that the property

be sold by the master to the highest cash bidder for payment of the amounts due under said trust deed.

The intervening petition of Cohen alleged, in substance, that he was the owner of one \$100 bond of the issue "secured by the trust deed herein foreclosed;" that the bondholders were widely scattered and not in a position to purchase the property for their own benefit; that there would be no bona fide cash bidders at the sale; and prayed that the court fix an upset price and direct the successor trustee to "bid in and purchase the property herein foreclosed" in the event said upset price was not realized in cash at the sale.

June 15, 1934, plaintiff filed its answer to said intervening petition in which it averred inter alia:

"That under the terms and provisions of said Trust Deed, this respondent has no authority or power to purchase the premises conveyed thereby, and apply on account of the purchase price the indebtedness due the holders of the bonds and coupons secured by said Trust Deed, or due by reason of advances made by such holders of bonds and/or coupons secured by said Trust Deed, for solicitors' fees, stenographers' fees, Trustee's fees, documentary evidence, and cost of abstract and examination of title."

After reference to a master in chancery for the purpose of hearing evidence as to the value of the property and his report thereon, the decree appealed from was entered July 18, 1934, sustaining the allegations of the intervening petition, fixing an upset price and ordering that "in the event of there being no bona fide bidder for cash for not less than the sum of \$27,400, then in such event the Chicago Title and Trust Company, as Trustee, be and is hereby authorized and directed to bid at such sale in its representative capacity for the use and benefit of itself and of all owners of bonds, the sum of \$34,255.11, being the full amount due in the Decree herein in the amount of \$38,455.11, less the amount now in the hands of the assignee of rents, which said rents are being held for the benefit of the bondholders, and which amount is in the sum of \$700,

he sold by the master to the highest cash bidder for payment

of the amounts due under said trust deed.

The intervening petition of Cohen alleged, in substance,

that he was the owner of one 100 bond of the issue "secured by

the trust deed herein for closed;" that the bondholders were widely

scattered and not in a position to purchase the property for their

own benefit; that there would be no high cash bidder at the

sale; and prayed that the court fix an upset price and direct the

successor trustee to bid in and purchase the property herein fore-

closed" in the event said upset price was not realized in cash at

the sale.

June 15, 1934, plaintiff filed its answer to said inter-

vening petition in which it averred inter alia:

"That under the terms and provisions of said Trust Deed, this respondent has no authority or power to purchase the property conveyed thereby, and apply on account of the purchase price the indebtedness due the holders of the bonds and coupons secured by said Trust Deed, or due by reason of advances made by such holders of bonds and/or coupons secured by said Trust Deed, for which -tors, fees, stenographers' fees, Trustee's fees, documentary evi- hence, and cost of abstract and examination of title."

After reference to a master in chancery for the purpose of

hearing evidence as to the value of the property and his report

thereon, the decree appealed from was entered July 15, 1934, and

confirming the allegations of the intervening petition, finding an upset

price and ordering that "in the event of there being no high cash

bidder for cash for not less than the sum of \$27,500, then in such

event the Chicago Title and Trust Company, as Trustee, be and is

hereto authorized and directed to bid at such sale in its representative

capacity for the use and benefit of itself and of all owners of

bonds, the sum of \$34,250.11, setting the full amount due in the decree

herein in the amount of \$38,485.11, less the amount now in the hands

of the assignee of rents, which said rents are being paid for the

benefit of the bondholders, and which amount is in the sum of \$500,

less such further amount as might reasonably be collected during the period of redemption, which sum the court finds to be \$3,500; that the Master in Chancery shall thereupon credit the amount of such bid by said Chicago Title and Trust Company, as Trustee, upon the amount found due it in the Decree of Foreclosure and sale heretofore entered herein."

Pursuant to the decree of July 18, 1934, the sale of the premises was held by the master and plaintiff, Chicago Title & Trust Company, bid \$34,225.11 for said premises in accordance with said decree.

September 6, 1934, the master's report of sale was filed and approved and a deficiency decree entered against the mortgagors who were therein found to be personally liable for the amount of such deficiency. Thereafter, September 7, 1934, defendant Samuel Blanksten filed a petition in which after stating that he was the owner of the equity of redemption and tendering his assignment of the rents to the premises as well as a waiver of his right to redemption of same, he prayed that the deficiency decree entered against him be satisfied and discharged. On the same date an order to that effect was entered.

Plaintiff's theory is that under the terms of the trust deed, it had no power or authority to bid in the premises for the benefit of all the bondholders; that the court had no jurisdiction to so direct it; that, therefore, the decree appealed from was void; and that good title to the property cannot be obtained unless said decree is reversed and the property resold in accordance with the original decree of sale.

The intervening petitioner's theory, as stated in his brief, is that the trust deed in question permits "any party interested in the decree of foreclosure to bid at the foreclosure sale;" that "the

less such further amount as might reasonably be collected during the period of redemption, which sum the court finds to be \$2,500; that the Master in Chancery shall thereupon credit the amount of such bid by said Chicago Title and Trust Company, as Trustee, upon the amount found due it in the Decree of Foreclosure and sale herebefore entered herein."

Truant to the decree of July 13, 1934, the sale of the premises was held by the master and plaintiff, Chicago Title & Trust Company, bid \$4,325.11 for said premises in accordance with said decree.

September 6, 1934, the master's report of sale was filed and approved and a deficiency decree entered against the mortgagors who were therein found to be personally liable for the amount of such deficiency. Thereafter, September 7, 1934, defendant Samuel Blankstein filed a petition in which after stating that he was the owner of the equity of redemption and tendering his assignment of the rents to the premises as well as a waiver of his right to redemption of same, he prayed that the deficiency decree entered against him be satisfied and discharged. On the same date in order to that effect was entered.

Plaintiff's theory is that under the terms of the trust deed, it had no power or authority to bid in the premises for the benefit of all the bondholders; that the court had no jurisdiction to so direct it; that, therefore, the decree appealed from was void; and that good title to the property cannot be obtained unless said decree is reversed and the property resold in accordance with the original decree of sale.

The intervening petitioner's theory, as stated in his brief, is that the trust deed in question permits "any party interested in the decree of foreclosure to bid at the foreclosure sale;" that "if

trustee placing upon this clause of the trust deed its logical interpretation caused to be entered a Decree of Foreclosure and Sale voluntarily and of its own motion, including in said decree an order specifically authorizing it to bid at the sale * * * certainly cannot now be heard to complain of its act in so doing;" that the "intervening petition was merely a logical sequence to this record and simply sought to carry out not only the terms of the trust deed but also the order of authority to bid caused to be entered by the Trustee in the original Decree of sale;" and that the trustee instead of at once appealing from the modified decree ordering it to bid, "voluntarily acted under the order of the court, bid in the property at the foreclosure sale and acted as trustee for a period of approximately one year before taking steps to appeal, at the same time, availing itself of the benefits of said decree, such benefits having been voluntarily taken" and has therefore waived its right to urge this appeal.

It is elementary that a party cannot appeal from an order with which it has voluntarily complied. (Williford v. Williford, 162 Ill. App. 24.) A party against whom an error has been committed may release such error, and if he voluntarily accepts benefits conferred upon him by the decree, such acceptance operates as a release of errors. (Schaeffer v. Ardery, 238 Ill. 557; Ruckman v. Alwood, 44 id. 183; Morgan v. Ladd, 2 Gilm. 414; Thomas v. Negus, 2 id. 700; 2 Cyc. 1007; 7 Ency. Pl. & Pr. 870.) One condition to the operation of the rule, however, is that the acceptance of benefits must be voluntary in the sense that the party is not required by the decree to do the act relied upon as a release of errors. It is urged that the modified decree of sale required plaintiff to bid at the master's sale in accordance with the provisions of said decree to avoid being adjudged in contempt of court.

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that the "intervening petition was merely a logical sequence to
this record and simply sought to carry out not only the terms of
the trust deed but also the order of authority to bid caused to be
entered by the Trustee in the original Decree of Sale;" and that
the trustees instead of at once appealing from the modified decree
ordering it to bid, "voluntarily acted under the order of the court,
bid in the property at the foreclosure sale as noted in trustee
for a period of approximately one year before taking steps to
appeal at the same time, availing itself of the benefits of said
decree, such benefits having been voluntarily taken" and has there-
fore waived its right to urge this appeal.
It is elementary that a party cannot appeal from an order
with which it has voluntarily complied. (Hillford v. Hillford,
162 Ill. App. 2d 4.) A party against whom an error has been committed
may release such error, and if he voluntarily accepts benefits con-
ferred upon him by the decree, such acceptance operates as a re-
lease of errors. (Schaeffer v. Kasper, 228 Ill. 557; Johnson v.
Johnson, 44 Ill. 183; Morgan v. Ladd, 2 Ill. 414; Thomas v. Thomas,
2 Ill. 700; 2 Cyc. 1007; 7 Ency. Pl. & Pr. 870.) One condition
to the operation of the rule, however, is that the acceptance of
benefits must be voluntary in the sense that the party is not
compelled by the decree to do the act relied upon as a release of
errors. It is urged that the modified decree of sale required
plaintiff to bid at the master's sale in accordance with the provi-
sions of said decree to avoid being adjudged in contempt of court.

But plaintiff could have avoided even that requirement by perfecting an appeal from the modified decree of sale within the ninety days allowed under the Civil Practice act. This it failed to do. Instead it saw to it that such modified decree of sale included appropriate provisions whereby the trustee would benefit by the fees inuring to it for its services in administering the property. It is stated in the brief of the intervening petitioner, and not denied, that "the Trustee caused the court to enter orders specifically permitting it to operate, manage and otherwise deal with the property which it was about to purchase at the foreclosure sale." The modified decree of sale provided that the trustee was authorized in connection with the management and operation of the property "to pay itself a reasonable charge or fee for services performed in connection with the operation and management of said property, in addition to the fees allowed it in the decree of foreclosure and sale."

As heretofore shown the decree appealed from was entered July 18, 1934, and plaintiff did not file its petition for leave to appeal to this court until July 17, 1935, the very last day of the year within which such petition might be filed under the law. Even though we assume that plaintiff was required under the modified decree to bid for ^{and} purchase the property at the master's sale, it cannot be questioned that it voluntarily accepted the benefit of the decree by managing and operating the property for a year and receiving payment for its services in so doing. It is manifest that the conduct of the plaintiff trustee brings this case within the class of cases where a party's right to appeal from an order is barred by his acceptance of benefits thereunder or by his voluntary compliance with its terms. (Schaeffer v. Ardrey, supra.) The intervening petition, in response to which the modified decree

But plaintiff could have avoided even that requirement by presenting an appeal from the modified decree of sale within the ninety days allowed under the civil practice act. This it failed to do. Instead it saw to it that such modified decree of sale including appropriate provision whereby the trustee could benefit by the fees inuring to it for its services in administering the property. It is stated in the brief of the intervening petitioner, and not denied, that "the trustee caused the court to enter orders specifically permitting it to operate, manage and otherwise deal with the property which it was about to purchase at the foreclosure sale." The modified decree of sale provided that the trustee was authorized in connection with the management and operation of the property "to pay itself a reasonable charge or fee for services performed in connection with the operation and management of said property, in addition to the fees allowed it in the decree of foreclosure and sale."

As heretofore shown the decree appealed from was entered July 12, 1934, and plaintiff did not file its petition for leave to appeal to this court until July 15, 1935, the very last day of the year within which such petition might be filed under the law. Even though we assume that plaintiff was required under the modified decree to bid for purchase the property at the master's sale, it cannot be questioned that it voluntarily accepted the benefits of the decree by managing and operating the property for a year and receiving payment for its services in so doing. It is manifest that the conduct of the plaintiff trustee brings this case within the class of cases where a party's right to appeal from an order is barred by his acceptance of benefits thereunder or by his voluntary compliance with its terms. (*Connelly v. Connelly, supra.*)

The intervening petition, in response to which the modified decree

of sale was entered, was filed not only in behalf of the petitioner therein but in behalf of all the bondholders, and it is significant to note that none of the bondholders objected to the entry of the modified decree by the trial court or joined with the trustee in assigning error upon this appeal.

While in the view we take of this case, it is unnecessary to determine whether the decision of the Supreme court in the case of Chicago Title & Trust Company v. Robin, 361 Ill. 261, is controlling on the question of the right of the trial court to fix an upset price and order the trustee in the instant case to purchase the property at the master's sale, this cause, in our opinion, is distinguishable from the Robins case at least to the extent that the trustee here not only had the power to bid at the sale by virtue of the terms of the trust deed, but so construed the trust deed itself and submitted itself to the jurisdiction of the court by including in the ~~the~~ original decree of foreclosure and sale, which it prepared, presented and caused the trial court to enter, the following order:

"It is further ordered that either the complainant or any of the other parties to this cause, or any group or committee of bondholders, may become the purchaser or purchasers at said sale; * * *."

For the reasons stated herein the decree of the superior court and all orders entered subsequent thereto are affirmed.

AFFIRMED.

Friend and Scanlan, JJ., concur.

of sale was entered, was filed not only in behalf of the plaintiff but in behalf of all the bondholders, and it is difficult to note that name of the bondholders objected to the entry of the modified decree by the trial court or joined with the trustee in assigning error upon this appeal.

While in the view we take of this case, it is unnecessary to determine whether the decision of the supreme court in the case of Chicago Title & Trust Company v. Board, 301 Ill. 221, is controlling on the question of the right of the trial court to fix an upset price and order the trustee in the instant case to purchase the property at the upset price, this court, in our opinion, is distinguishable from the Chicago case at least to the extent that the trustee here not only had the power to bid at the sale by virtue of the terms of the trust deed, but he constituted the trust deed itself and submitted it to the jurisdiction of the court by including in the ~~trust~~ original decree of foreclosure and sale, which is proper, presented and caused the trial court to enter the following order:

"It is further ordered that either the complainant or any of the other parties to this cause, or any group or committee of bondholders, may become the purchaser or purchasers at said sale; * * *"

For the reasons stated herein the decree of the superior court and all orders entered subsequent thereto are affirmed.

ATTEST.

Friend and Counsel, U.S., counsel.

38755

SAMUEL SKOLNICK,
Appellee,

v.

EDDIE SOUTH,
Appellant.

77
APPEAL FROM CIRCUIT COURT,
COOK COUNTY.

287 I.A. 627³

MR. PRESIDING JUSTICE SULLIVAN
DELIVERED THE OPINION OF THE COURT.

This appeal seeks to reverse a decree entered by the circuit court December 24, 1935, which dismissed defendant's counter-claim and enjoined defendant, South, "until September 16, A. D. 1936, from playing, acting, performing or rendering any service whatsoever in any manner contrary to any of the terms, provisions or conditions of said contract contained, as a musician or musical director for or on behalf of any firm, person or corporation, individually or in conjunction with any person, firm or corporation, any orchestra, theatrical or movie or recording company, or playing or performing in any manner contrary to any of the terms, provisions or conditions of said contract on any radio broadcast, except by and with the written consent of the plaintiff first had and obtained, unless it be an engagement obtained by the plaintiff." The court by the decree retained jurisdiction "for the purpose of requiring an accounting from defendant to plaintiff, Samuel Skolnick." Plaintiff filed no brief.

Plaintiff filed his complaint November 5, 1935, and an amended complaint November 21, 1935, praying for an injunction and an accounting, and defendant filed his answer to the

38783

SAMUEL KROENICK,
Appellee,

v.

KIDNIE SOUTH,
Appellant.

ALABAMA THIRTH CIRCUIT COURT,
COOK COUNTY.

287 I.A. 627

MR. JUSTICE THOMAS
DELIVERED THE OPINION OF THE COURT.

This appeal seeks to reverse a decree entered by the circuit court December 24, 1935, which dismissed defendant's counter-claim and enjoined defendant, South, "until September 16, A. D. 1936, from playing, acting, performing or rendering any service whatsoever in any manner contrary to any of the terms, provisions or conditions of said contract contained, as a musician or musical director for or on behalf of any firm, person or corporation, individually or in connection with any person, firm or corporation, any orchestra, theatrical or movie or recording company, or playing or performing in any manner contrary to any of the terms, provisions or conditions of said contract on any radio broadcast, except by and with the written consent of the plaintiff first had and obtained, unless it be an engagement obtained by the plaintiff." The court by the decree retained jurisdiction "for the purpose of retaining an accounting from defendant to plaintiff, Samuel Kroenick," plaintiff filed no brief.

Plaintiff filed his complaint November 2, 1935, and an amended complaint November 21, 1935, praying for an injunction and an accounting, and defendant filed his answer to the

amended complaint and a counter-claim November 21, 1935.

September 9, 1931, South, an orchestra leader and violinist of some exceptional ability, entered into a contract with Skolnick and one Rothstein, as copartners, under the terms of which it was agreed that they were to have the exclusive management and control of defendant's services for five years, in return for which they guaranteed to pay him for such services a stipulated amount for thirty-five weeks of each year covered by the contract. It is conceded that Skolnick and Rothstein defaulted in their payments to South under the contract. August 2, 1933, plaintiff and defendant entered into an agreement, the pertinent portions of which are as follows:

"WHEREAS there is now in existence a contract between said South and one William R. Rothstein and Skolnick, as copartners, which said contract provides, among other things as follows: [recital follows of material provisions of that contract]

"WHEREAS said contract will have been in force for a period of two years on September 9th, 1933, and during said period, said South has not received the amount guaranteed by the said William R. Rothstein and Skolnick, during the first year of said contract; and

"WHEREAS said South intends to serve notice upon said William R. Rothstein and Skolnick, on or before September 9th, 1933, in which he will notify said parties that he intends to cancel said contract and consider it terminated, unless the amounts therein specified, which he was to have received during the two years in which said contract was in force, are paid, and that if said sums are not paid, said South intends to file a bill in a court of equity to have said contract declared cancelled and of no force and effect; unless said contract is voluntarily cancelled by the parties thereto; and

"WHEREAS said South is desirous of entering into a contract with said Skolnick under which Skolnick will be his sole and exclusive Manager and representative, provided said contract hereinbefore referred to and set forth hereinabove is declared cancelled and * * *,

"NOW, THEREFORE, in consideration of the covenants herein-after contained, it is mutually agreed between the parties as follows:

"That if said contract, dated September 9th, 1931, by and between WILLIAM R. ROTHSTEIN and SAMUEL SKOLNICK, copartners, therein called Parties of the First Part, and EDDIE SOUTH, therein called Party of the Second Part, as hereinabove set out, is * * * voluntarily cancelled by the parties thereto * * * said SOUTH and SKOLNICK will immediately enter into a contract which said contract will contain the following terms and provisions:

amended complaint and a count 7-alien November 21, 1935.

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agreed that they were to have the exclusive management and control

of defendant's services for five years, in return for which the

defendant agreed to pay him for such services a stipulated amount for

thirty-five weeks of each year covered by the contract. It is

conceded that Kohnick and Rothstein defaulted in their payments

to South under the contract. August 2, 1933, Kohnick and defendant

and entered into an agreement, the pertinent portions of which

are as follows:

"WHEREAS there is now in existence a contract between said South and one William R. Rothstein and Kohnick, as copartners, which said contract provides, among other things, as follows: [recited follows of material provisions of that contract];

"WHEREAS said contract will have been in force for a period of two years on September 9th, 1933, and during said period, said South has not received the amount warranted by the said William R. Rothstein and Kohnick, during the first

year of said contract; and

"WHEREAS said South intends to serve notice upon said William R. Rothstein and Kohnick, on or before September 9th, 1933, in which he will notify said parties that he intends to cancel said contract and consider it terminated, unless the amounts therein specified, which he was to have received during the two years in which said contract was in force, are paid, and that if said sums are not paid, said South intends to file a bill in a court of equity to have said contract declared null and void and of no force and effect; and said contract is voluntarily cancelled by the parties hereto; and

"WHEREAS said South is desirous of entering into a contract with said Kohnick under which Kohnick will be his sole and exclusive manager and representative, provided said contract hereinafter referred to and set forth hereabove is declared cancelled and * * *

"NOW, THEREFORE, in consideration of the covenants herein-after contained, it is mutually agreed between the parties as follows:

"That if said contract, dated September 9th, 1931, by and between WILLIAM R. ROTHSTEIN and GEORGE K. KOHNICK, copartners, therein called Parties of the First Part, and said SOUTH, therein called Party of the Second Part, as hereabove set out, is * * * voluntarily cancelled by the parties thereto * * * said SOUTH and Kohnick will immediately enter into a contract which said contract will contain the following terms and provisions:

"1. SOUTH hereby appoints SKOLNICK as his sole and exclusive Manager and representative * * * beginning on or about the date of cancellation of the contract now in existence between one WILLIAM R. ROTHSTEIN and SKOLNICK, as First Parties, and said SOUTH, as Second Party, dated September 9th, 1931, and continuing for a period of one (1) year from said date, with an option on the part of said Skolnick to renew said contract from year to year as hereinafter provided.

* * *

"3. The said parties agree that the net profits earned from the services or performances of South shall be divided in equal shares by SOUTH and SKOLNICK, after deducting the salaries of the members of his orchestra, and all other necessary expenses incurred in connection with the operation and management of said SOUTH, and/or his orchestra.

"4. Said First Party guarantees that said Second Party will receive not less than SIX THOUSAND DOLLARS (\$6,000) as his share of the net profits and in the event his share of the net profits is less than \$6,000, said party of the first part promises to pay the difference between what said second party has received as his share of the net profits and SIX THOUSAND DOLLARS (\$6,000).

"5. That said First Party shall have the option to renew said contract for a period of One (1) year under the same terms and conditions except as to compensation hereinafter provided, if SOUTH has received the sum of SIX THOUSAND DOLLARS (\$6,000) hereinabove mentioned, and all the terms and conditions of this contract have been performed by the party of the first part."

August 31, 1933, South, Skolnick and Rothstein agreed in writing to cancel the contract of September 9, 1931, which gave Rothstein and Skolnick, as copartners, exclusive management of South's services, and it was stipulated therein that South "agrees to release said parties of the first part from any and all liability for all moneys due or to become due under said contract."

Immediately after this cancellation agreement Skolnick proceeded with his exclusive management of South under the provisions of the agreement of August 2, 1933, and procured an engagement for him and his orchestra at the Regal theatre for the week commencing September 3, 1933. The net profits of this engagement were divided equally between South and Skolnick as provided in said agreement of August 2, 1933, as heretofore set forth.

September 16, 1933, an additional agreement was signed by Skolnick and South and attached to the written agreement of August 2, 1933. The additional agreement, after stating, "It is mutually

"1. SOUTH hereby grants to KOLNICK an exclusive

exclusive manager and representative * * * beginning on or about the date of cancellation of the contract not in existence between one WILLIAM R. KOLNICK and KOLNICK, as first parties, and said SOUTH, as second party, dated September 23, 1931, and continuing for a period of one (1) year from said date, with an option on the part of said KOLNICK to renew said contract from year to year as hereinafter provided.

"* * *

"3. The said parties agree that the net profits earned from the services or performances of South shall be divided in equal shares by SOUTH and KOLNICK, after deducting the salaries of the members of his orchestra, and all other necessary expenses incurred in connection with the operation and management of said SOUTH, and/or his orchestra.

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"5. That said first party shall have the option to renew said contract for a period of one (1) year under the same terms and conditions except as to compensation hereinafter provided, if SOUTH has received the sum of SIX THOUSAND DOLLARS (\$6,000) hereinafter mentioned, and all the same and conditions of this contract have been performed by the party of the first party."

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equally between South and KOLNICK as provided in said agreement of

August 31, 1933, as heretofore set forth.

September 16, 1933, an additional agreement was signed by

KOLNICK and South and attached to the written agreement of August

23, 1933. The additional agreement, after stating, "It is mutually

agreed by and between the parties hereto that the within and foregoing contract be and the same is hereby amended as follows:" (Italics ours) made certain modifications of and additions to the agreement of August 2, 1933, which are not material to the issues here.

Defendant contends that his contract with plaintiff went into effect August 31, 1933, when his prior contract with Rothstein and Skolnick was cancelled, the instrument of September 16, 1933, being on its face merely a modification of the agreement of August 2, 1933, which provided that if the contract of September 9, 1931, was voluntarily cancelled "South and Skolnick will immediately enter into a contract" (the terms of which were included in the agreement of August 2, 1933, as hereinbefore shown) or in any event that his contract with plaintiff went ^{into} effect not later than September 3, 1933, when Skolnick secured the first engagement for South and his orchestra under the terms of the agreement of August 2, 1933, and that the trial court erred in finding that Skolnick and South entered into the contract in question September 16, 1933; that the court erred in finding that South earned \$5,015.64 "from September 16, 1933, the date said contract was entered into, to September 11, 1934;" that the decree was erroneously entered because plaintiff did not exercise his option to renew the contract for the second year in apt time - time being of the essence of an option contract, whether so stated therein or not; and that the alleged tender was not made in apt time and in any event was insufficient.

While the instrument of August 2, 1933, was, in fact, an agreement to enter into a contract at a future time contingent upon the cancellation of defendant's previous contract with Skolnick and Rothstein, which was in default, it specified that upon such cancellation "South and Skolnick will immediately enter into a

agreed by and between the parties hereto that the within and foregoing contract be and the same is hereby amended as follows: (italics ours) made certain modifications of and addition to the agreement of August 2, 1933, which are not material to the issues here.

Defendant contends that his contract with Plaintiff was into effect August 31, 1933, when his prior contract with Kohnstein and Kohnick was cancelled, the instrument of September 16, 1933, being on its face merely a modification of the agreement of August 2, 1933, which provided that if the contract of September 2, 1933, was voluntarily cancelled "South and Kohnick will immediately enter into a contract" (the terms of which were included in the agreement of August 2, 1933, as heretofore shown) or in any event that his contract with Plaintiff would be entered into not later than September 3, 1933, when Kohnick secured the first engagement for South and his orchestra under the terms of the agreement of August 2, 1933, and that the trial court erred in finding that Kohnick and South entered into the contract in question September 16, 1933; that the court erred in finding that South earned \$5,000.00 "from September 16, 1933, the date said contract was entered into, to September 11, 1934;" that the decree was erroneously entered because Plaintiff did not exercise his option to renew the contract for the second year in apt time - time being of the essence of an option contract, neither so stated therein or not; and that the Plaintiff was not made in apt time and in any event was insufficient. While the instrument of August 2, 1933, was, in fact, an agreement to enter into a contract at a future time contingent upon the cancellation of defendant's previous contract with Kohnick and Kohnstein, which was in default, it specified that upon such cancellation "South and Kohnick will immediately enter into a

contract," detailing the provisions of same, including the provision that Skolnick was to receive half of the net profits accruing from South's services. That the parties, themselves, treated the contract provisions as set forth in the agreement of August 2, 1933, as being in effect immediately upon the cancellation of the prior contract is evidenced by the engagement of South and his orchestra for the week beginning September 3, 1933. It is reasonable to assume that it required some time prior to said date for Skolnick to procure this engagement. Skolnick's retention of half the net profits of this engagement is hardly compatible with his claim that his contract with South did not become effective until September 16, 1933. The only purpose and effect of the instrument of that date was to modify in certain respects, not material here, the contract set forth in the agreement of August 2, 1933, to which it was attached, the parties stating "that the within and foregoing contract be and the same is hereby amended." The construction that the parties to a contract put upon it by their own actions is the construction the court should adopt and it would be unfair and inequitable to hold that the contract was not entered into until September 16, 1933, when the instrument of that date specified that it was simply an amendment of the prior contract and it is conceded that plaintiff procured the engagement for South, commencing September 3, 1933, retaining half of the net profits from same.

The chancellor found in the decree that defendant earned \$5,015.64 during the year covered by the contract. It is difficult to understand how this figure was arrived at except by an endeavor to adjust defendant's earnings to plaintiff's tender of \$984.36 so as to arrive at a total of \$6,000, the amount due defendant under ^{the} contract for his first year's service. It is undisputed

under contract for his first year's service. It is undisputed as to arrive at a total of \$6,000, the amount due defendant to adjust defendant's earnings to plaintiff's tender of \$3,000.00 to understand how this figure was arrived at except by an answer of \$5,015.04 during the year covered by the contract. It is difficult The chancellor found in the books that defendant earned profits from same.

South, commencing September 3, 1933, retaining half of the net and it is conceded that plaintiff procured the engagement for plaintiff that it was simply an amendment of the prior contract into until September 16, 1933, when the instrument of that date null and ineffectual to hold that the contract was not entered into until September 16, 1933, when the instrument of that date attestation that the parties to a contract put upon it by their own foregoing contract be and the same is hereby amended." The contract it was attached, the parties stating "that the within and the contract set forth in the agreement of August 2, 1933, to of that date was to modify in certain respects, not material here, September 16, 1933. The only purpose and effect of the instrument claim that his contract with South did not become effective until the net profits of this engagement is hardly compatible with his Kolnick to procure this engagement. Kolnick's retention of half able to assume that it required some time prior to said date for orchestra for the week beginning September 3, 1933. It is reasonable prior contract is evidenced by the engagement of South and his 1933, as being in effect immediately upon the cancellation of the the contract provisions as set forth in the agreement of August 2, from South's services. That the parties, themselves, stated also that Kolnick was to receive half of the net profits according contract," detailing the provision of same, including the provi-

that the total amount received from Skolnick by South under his contract was \$4,798.27. Plaintiff testified that he also made a number of loans to defendant aggregating \$185, which defendant denied. Plaintiff testified further that he advanced to defendant \$250 for railroad transportation. He was forced to admit that this amount was properly charged by him as an expense and was collected by him from defendant's earnings. We are convinced from the evidence that all that South received from Skolnick during the year the contract in question was in effect was the aforementioned amount of \$4,798.27.

Did plaintiff exercise his option to renew the contract for the second year within apt time and did he make a sufficient tender within apt time? As related to the exercise of an option, time is of the essence of the option contract whether so stated in express language or not. (Northern Illinois Coal Corporation v. Cryder, 361 Ill. 274.) We have shown that the contract between the parties for the first year became effective not later than September 3, 1933. South was entitled to receive \$6,000 from Skolnick under the contract for his services for the year. An option is a mere offer and, unless it is accepted within the time limited, it is of no force for any purpose. (Upton v. Traveler's Insurance Co., 2 A. L. R. 1597, 178 Pac. 85.) Thus, in order for plaintiff to have exercised his renewal option within the requirements of the contract, it was necessary that he tender defendant \$1,210.73, the difference between \$4,789.27, which he received, and \$6,000, which he should have received, instead of \$984.36, which he testified he did tender, and that such tender in the proper amount be made not later than September 3, 1934, the expiration date of the contract, calculating one year from September 3, 1933, when defendant's first engagement under the contract

that the total amount received from Kohnick by South under his contract was \$4,738.27. Plaintiff testified that he also made a number of loans to defendant aggregating \$135, which defendant denied. Plaintiff testified further that he advanced to defendant \$250 for railroad transportation. He was forced to admit that this amount was properly charged by him as an expense and was collected by him from defendant's earnings. He was convinced from the evidence that all that South received from Kohnick during the year the contract in question was in effect was the aforementioned amount of \$4,738.27.

Did plaintiff exercise his option to renew the contract for the second year within the time and did he make a tender tender within the time? As related to the exercise of an option, time is of the essence of the option contract whether so stated in express language or not. (Northern Illinois Coal Corporation v. Snyder, 301 Ill. 274.) We have shown that the contract between the parties for the first year became effective not later than September 3, 1933. South was entitled to receive \$4,000 from Kohnick under the contract for his services for the year. An option is a mere offer and, unless it is accepted within the time limited, it is of no force for any purpose. (Johnson v. Traveler's Insurance Co., 2 N. H. 1527, 178 Pac. 85.) Thus, in order for plaintiff to have exercised his renewal option within the requirements of the contract, it was necessary that he tender defendant \$1,210.73, the difference between \$4,738.27, which he received, and \$4,000, which he should have received, instead of \$284.25, which he testified he did tender, and that such tender in the proper amount be made not later than September 3, 1934, the expiration date of the contract, calculating one year from September 3, 1933, when defendant's first payment under the contract

began. Plaintiff's tender in the insufficient amount indicated was not made until September 11, 1933. We are impelled to hold that plaintiff's tender was insufficient, that it was not made in apt time and that his option to renew the contract for a second year was not legally exercised. The record before us affords no basis, legal or equitable, for the decree in this cause granting injunctive relief.

It is impossible from the record to ascertain how the chancellor resolved plaintiff's claim as to the loans aggregating \$185 he testified he made to defendant. The evidence is not convincing that plaintiff should be allowed credit on account thereof. Inasmuch as it is uncontroverted that defendant received only \$4,789.27 under the contract instead of the \$6,000 he was entitled to receive thereunder from plaintiff, defendant's counter-claim for the balance due him under the contract, amounting to \$1,210.73, should have been allowed.

Other points are urged for reversal, but in the view we take of this cause we deem it unnecessary to discuss them.

For the reasons indicated herein the decree of the circuit court is reversed and the cause is remanded with directions to dissolve the injunction, to dismiss plaintiff's complaint for want of equity, to allow defendant's counter-claim and to enter judgment thereon in the amount of \$1,210.73.

REVERSED AND REMANDED WITH DIRECTIONS.

Friend and Scanlan, JJ., concur.

Plaintiff's tender in the instant case, which was not made until September 11, 1935. He was obliged to hold that plaintiff's tender was insufficient, that it was not made in apt time and that his option to renew the contract for a second year was not legally exercised. The record before us affords no basis, legal or equitable, for the decree in this cause granting injunctive relief.

It is impossible from the record to ascertain how the chancellor resolved plaintiff's claim as to the loans representing \$135 he testified he made to defendant. The evidence is not convincing that plaintiff should be allowed credit on account thereof. Inasmuch as it is uncontroverted that defendant received only \$4,792.25 under the contract instead of the \$6,000 he was entitled to receive thereunder from plaintiff, defendant's counter-claim for the balance due him under the contract, amounting to \$1,207.75, should have been allowed.

Other points are urged for reversal, but in the view we take of this cause we deem it unnecessary to discuss them. For the reasons indicated herein the decree of the circuit court is reversed and the case is remanded with directions to dissolve the injunction, to dismiss plaintiff's complaint for want of equity, to allow defendant's counter-claim and to enter judgment thereon in the amount of \$1,207.75.

REVEREND AND HONORABLE JUDGE

Friend and Counsel, J. J. Conner.

38788

AUGUST A. ZAVADIL,
Appellee,

v.

FORREST H. NORRIS, executor
of the estate of Albina P.
Norris, deceased,
Appellant.

78
APPEAL FROM CIRCUIT
COURT OF COOK COUNTY.

287 I.A. 627⁴

MR. PRESIDING JUSTICE SULLIVAN
DELIVERED THE OPINION OF THE COURT.

The claimant, August A. Zavadil, filed a claim in the probate court November 19, 1934, against the estate of Albina P. Norris, deceased, on a note for \$1,000. February 6, 1935, the claim was allowed for \$1,146.76 as a sixth class claim. An appeal was taken to the circuit court by the executor of the estate and that court, after hearing the cause without a jury, also allowed the claim in the same amount. This appeal followed.

The note in question was an ordinary judgment note for \$1,000, dated January 2, 1930, payable in Chicago one year after date and signed as follows: "Albina Palecek Norris, M. D., Pres. Longview Realty Tr. Benjamin H. Palecek, Treas."

It appeared that Joseph Palecek, his wife, Anna Palecek, their two children, Albina Palecek Norris and Benjamin H. Palecek, and the latter's wife, resided, in 1923, in Feeding Hills or Agawam, which was a suburb of Springfield, Massachusetts; that Joseph and Anna Palecek owned vacant property there, which they were subdividing; that they were required by the municipal authorities to install water pipes in the subdivision; that they

AUGUST A. ZAVADIL,
Appellee,

v.

FOREST H. MORRIS, executor
of the estate of ALBINA F.
MORRIS, deceased,
Appellant.

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387 I.A. 627

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Tree, Longview Realty Co., Benjamin H. Falesek, Treas."

It appeared that Joseph Falesek, his wife, Anna Falesek, their two children, Albina Falesek Morris and Benjamin H. Falesek, and the latter's wife, resided, in 1923, in Reading Hill or Agawan, which was a suburb of Springfield, Massachusetts; that Joseph and Anna Falesek owned vacant property there, which they

were subdividing; that they were required by the municipal authorities to install water pipes in the subdivision; that they

were short of the funds necessary to comply with these requirements; that in December, 1923, both Albina Palecek Norris and Benjamin H. Palecek solicited claimant, who resided in Chicago and is an uncle of the latter's wife, for a loan of \$1,000; that claimant forwarded to Joseph and Anna Palecek a cashier's check drawn by the cashier of the Kaspar State Bank in Chicago for \$1,000, dated January 7, 1924, and payable to their order, which was indorsed by them and paid in due course; that at the time claimant made the loan to Joseph and Anna Palecek, Albina Palecek Norris and Benjamin H. Palecek executed their personal note to Zavadil for \$1,000 (this note was not presented in evidence) and December 27, 1927, a note for the same amount was given to claimant, signed by Albina Palecek Norris and Benjamin H. Palecek; that the interest was fully paid on the indebtedness until January 2, 1930, when the note in controversy was executed and accepted by claimant in renewal of the note of December 27, 1927; that June 29, 1925, December 26, 1925, and June 24, 1926, semiannual interest payments of \$30 each were made to claimant on the loan by checks on the West Springfield Trust Company, having printed on the face thereof in large letters "Longview Realty Trust" and signed "Dr. A. P. Norris, President, Benjamin H. Palecek, treasurer;" that June 12, 1927, December 16, 1927, and December 20, 1928, semiannual interest on the loan was paid to the claimant by checks payable to him drawn on the First National Bank of Berwyn, Illinois, and signed "Dr. A. P. Norris, Pres. Trustee, Longview Realty Trust." It also appeared that a common law trust was organized May 19, 1934, of which Albina P. Norris, Benjamin H. Palecek and one Thomas P. Shea, an attorney, who later resigned, were trustees; that the trust instrument creating same was recorded as required by law May 20, 1924, in the office of the Registrar in Hampden county, Massachusetts; that May 19, 1924,

were short of the funds necessary to comply with these requirements; that in December, 1923, both Albin Palecek and Benjamin H. Palecek solicited claimant, who resided in Chicago and is an uncle of the latter's wife, for a loan of \$1,000; that claimant forwarded to Joseph and Anna Palecek a cashier's check drawn by the cashier of the Knapex State Bank in Chicago for \$1,000, dated January 7, 1924, and payable to their order, which was indorsed by them and paid in due course; that at the time claimant made the loan to Joseph and Anna Palecek, Albin Palecek and Benjamin H. Palecek executed their personal note to Knapex for \$1,000 (this note was not presented in evidence) and December 27, 1927, a note for the same amount was given to claimant, signed by Albin Palecek, Benjamin H. Palecek, and the interest was fully paid on the indebtedness until January 3, 1930, when the note in controversy was executed and accepted by claimant in payment of the note of December 27, 1927; that June 20, 1925, December 26, 1925, and June 24, 1926, semiannual interest payments of \$30 each were made to claimant on the loan by checks on the First Springfield Trust Company, having printed on the face thereof in large letters "Longview Realty Trust" and signed "Dr. A. F. Morris, President, Benjamin H. Palecek, Treasurer"; that June 18, 1927, December 18, 1927, and December 20, 1928, semiannual interest on the loan was paid to the claimant by checks payable to him drawn on the First National Bank of B. Wynn, Illinois, and signed "Dr. A. F. Morris, Pres. Trustee, Longview Realty Trust." It also appeared that a common law trust was organized May 19, 1924, of which Albin D. Morris, Benjamin H. Palecek and one Thomas D. Allen, an attorney, were trustees; that the trust instrument creating the trust was recorded as required by law May 20, 1924, in the office of the Register in Randolph county, Massachusetts; that May 19, 1924,

when the trust agreement was executed, Joseph Palecek and Anna Palecek, his wife, conveyed to the trustees of said trust the vacant property being subdivided and received certificates representing the entire beneficial interest in the trust; that the certificates of beneficial interest entitled the holders thereof to a dividend of the profits and ultimate proceeds of the trust but to no interest in the trust property itself; and that the entire control, management and title to the trust property were vested in the trustees with power to improve and develop the same and "to execute and deliver instruments in writing which they may deem necessary in the execution of their powers."

Oscar Wernhoff, a disinterested witness, who had lived with the Palecek family for many years, testified that the proceeds of the \$1,000 loan were spent "for street pipes and material for improvements on Longview Heights;" that claimant visited the property, which was the subject of the trust in 1925, and that in September, 1931, the witness was present at a conversation in which claimant asked Benjamin H. Palecek "if there would be enough property in Longview Heights to cover its note" and Palecek replied that there was.

The question presented for our determination is whether under section 20 of the Illinois Negotiable Instruments Law (par. 40, sec. 20, ch. 98, Ill. State Bar Stats., 1935) the note involved created a trust obligation or an individual obligation. Sec. 20 provides as follows:

"Where the instrument contains, or a person adds to his signature, words indicating that he signs for or on behalf of the principal, or in a representative capacity, he is not liable on the instrument, if he was duly authorized; but the mere addition of words describing him as agent, or as filling a representative character without disclosing his principal, does not exempt him from personal liability."

It is reasonable to infer that when Albina Palecek Norris

When the trust agreement was executed, Joseph Palecek and Anna Palecek, his wife, conveyed to the trustees of said trust the present property being subdivided and received certificates representing the entire beneficial interest in the trust; that the certificates of beneficial interest entitled the holders thereof to a dividend of the profits and ultimate proceeds of the trust but to no interest in the trust property itself; and that the entire control, management and title to the trust property were vested in the trustees with power to improve and develop the same and "to execute and deliver instruments in writing which they may deem necessary in the execution of their powers."

Oscar Bernhoff, a disinterested witness, who had lived with the Palecek family for many years, testified that the proceeds of the \$1,000 loan were spent "for street pipes and material for improvements on Longview Heights;" that claimant visited the property, which was the subject of the trust in 1925, and that in September, 1931, the witness was present at a conversation in which claimant asked Benjamin H. Palecek "if there would be enough property in Longview Heights to cover its note" and Palecek replied that there was.

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It is reasonable to infer that when Anna Palecek wrote

and her brother Benjamin H. Palecek requested claimant in December, 1923, to make the loan, they did so in behalf of their parents, Joseph and Anna Palecek, since, when Zavadil decided to make the loan of \$1,000, the check for that amount which he forwarded to Joseph and Anna Palecek was made payable to them. The evidence in the record is conclusive that the loan when made was not made to the deceased Albina Palecek Norris, in whole or in part, and that she received no individual benefit therefrom. The evidence sufficiently shows that her parents, the owners of the vacant land heretofore referred to, in subdividing same, were pressed for money and used the proceeds of claimant's loan, unquestionably made to them, for the purpose of purchasing water pipes for installation in said premises.

When the trust was organized shortly after the loan was made by claimant to Joseph and Anna Palecek and they conveyed the property to the trust, it was natural and proper that the trust would assume the obligation of paying the loan since the property which was the subject of the trust had received the benefit of same. That the trust did assume this obligation is evidenced by the six interest checks which were paid by it to claimant. The fact that deceased and her brother signed one or two accommodation notes in which they individually promised to pay the loan may only be considered as evidence bearing upon the liability of Albina Palecek Norris on the note of January 2, 1930, and is certainly not conclusive of her liability. Repayment of this loan was never her obligation. Primarily it was the obligation of her parents and after the creation of the trust, to which the property which received the benefit of the loan was conveyed, it was assumed by the trust, as is clearly shown by the evidence. Albina Palecek Norris and Benjamin H. Palecek as the sole surviving trustees of the Longview Realty Trust had express authority under the trust agreement

view Realty Trust had express authority under the trust agreement and Benjamin H. Palecek as the sole surviving trustee of the Trust, as is clearly shown by the evidence. Albin Palecek Morris carried the benefit of the loan was conveyed, it was assumed by the creation of the trust, to which the property which was obligated. Primarily it was the obligation of her parents and Palecek Morris on the note of January 2, 1920, and is certainly not conclusive of her liability. Repayment of this loan was never her only be considered as evidence bearing upon the liability of Albin Palecek Morris in which they individually promised to pay the loan may fact that deceased and her brother signed one or two accommodation the six interest checks which were paid by it to claimant. The same. That the trust did assume this obligation is evidenced by which was the subject of the trust had received the benefit of would assume the obligation of paying the loan since the property property to the trust, it was natural and proper that the trust made by claimant to Joseph and Anna Palecek and they conveyed the loan was organized shortly after the loan was in said premises. them, for the purpose of purchasing water pipes for installation and used the proceeds of claimant's loan, unquestionably made to heretofore returned to, in subdividing same, were pressed for money sufficiently shows that her parents, the owners of the vacant land that she received no individual benefit therefrom. The evidence to the deceased Albin Palecek Morris, in whole or in part, and in the record is conclusive that the loan when made was not made Joseph and Anna Palecek was made payable to them. The evidence loan of \$1,000, the check for that amount which he forwarded to Joseph and Anna Palecek, since, when it was decided to make the 1923, to make the loan, they did so in behalf of their parents, and her brother Benjamin H. Palecek requested claimant in December,

to borrow money to develop the trust property and to execute appropriate instruments to evidence loans for such purpose. A fortiori they had authority to execute a note to pay a loan made by the beneficiaries of the trust to develop such property. When Zavadil received the note, executed as it was, the manner of its negotiation was sufficient to put him on notice that it was the note of the Longview Realty Trust. Although the burden was on the claimant to show, if he could, that Dr. Norris and Benjamin H. Palecek were not authorized to execute the note for the trust, he failed to assume that burden, but in any event the evidence is conclusive that they did have such authority. They were executing on behalf of the trust an evidence of indebtedness as shown by the name of the trust immediately below the name of Albina Palecek Norris, with the abbreviation "Pres." immediately after her name and preceding the name of the trust, indicating her representative capacity. For that the legislature has declared she is not personally liable. (Mathis v. Liberty Straw Spreader Co., 238 Ill. App. 467.) The claimant knew when he accepted the note upon which his claim is predicated that it was signed differently from the note it renewed; that, the loan having been made to their parents, Albina Palecek Norris and her brother signed the previous note or notes merely as accommodation makers; that he had received interest checks for several years from the trust and not from Albina Palecek Norris, personally; and that the loan was not made to Albina Palecek Norris and Benjamin H. Palecek and that the indebtedness was not theirs.

The note in question evidenced an obligation for which the trust recognized its liability. It was signed in a representative capacity and the name of the principal was disclosed on its face. Albina Palecek Norris and Benjamin H. Palecek

to borrow money to develop the trust property and to execute appropriate instruments to evidence loans for such purpose. A fortiori they had authority to execute a note to pay a loan made by the beneficiaries of the trust to develop such property. When David received the note, executed as it was, the manner of its negotiation was sufficient to put him on notice that it was the note of the Douglas Realty Trust. Although the burden was on the claimant to show, it he could, that Mr. Norris and Benjamin H. Palecek were not authorized to execute the note for the trust, he failed to assume that burden, but in any event the evidence is conclusive that they did have such authority. They were executing on behalf of the trust an evidence of indebtedness as shown by the name of the trust immediately below the name of Almina Palecek Norris, with the abbreviation "Trs." immediately after her name and preceding the name of the trust, indicating her representative capacity. For that the legislature has declared she is not personally liable. (Mathis v. Libbey, 238 Ill. App. 407.) The claimant knew when he accepted the note upon which his claim is predicated that it was signed differently from the note it replaced; that the loan having been made to their parents, Almina Palecek Norris and her brother signed the previous note or notes merely as accommodation makers; that he had received interest checks for several years from the trust and not from Almina Palecek Norris, personally; and that the loan was not made to Almina Palecek Norris and Benjamin H. Palecek and that the indebtedness was not theirs. The note in question evidenced an obligation for which the trust recognized its liability. It was signed in a representative capacity and the name of the principal was disclosed on its face. Almina Palecek Norris and Benjamin H. Palecek

were not only the president and treasurer, respectively, of the trust but they were the only surviving trustees of same and they had authority to execute the note. Sec. 20 of the Negotiable Instruments Law declares that under such circumstances there is no personal liability. Whenever a form of instrument is such as to fairly indicate to the eye of common sense that the maker signs as agent or in a representative capacity, he is relieved of personal liability if duly authorized. (Hawthorne v. Austin Organ Co., 71 Fed. (2d) 945.)

In Gutelius v. Stanbon, 39 Fed. (2d) 62, where a note was signed "Harry Stanbon, William M. Nye, Walter H. Hill, Trustees of Stanbon, Nye and Hill Realty Trust," the trust being a common law trust holding real estate, and where such trust purchased certain lands in Florida, executing four purchase money notes, signed as above indicated, in part payment, two of which came into the hands of a bona fide purchaser for value, and a receiver of a bank brought an action on same against both the trustees individually and the trust, the court, after quoting section 20 of the Negotiable Instruments Law, said at pp. 623-24:

"This statute apparently re-enacts the established rule of the common law applicable to contracts of agents made on behalf of a disclosed principal. It had been universally held, in the federal courts at least, that an instrument bearing on its face all the signs of being the contract of the principal could not be held to bind the agent personally. * * *

"In the view I have taken of the matter, it is unnecessary to determine whether the plaintiff, as holder in due course of the note, is bound by the provisions of the declaration of trust exempting the trustees from personal liability. The statute effectually does that if they add to their signatures words indicating that they sign in a representative capacity, disclose their principal, and are duly authorized. Respecting the obligations upon which this cause of action is predicated, the defendants have added to their signatures words indicating that they signed in a representative capacity. They disclosed their principal, and they were duly authorized. Therefore they are not liable on the instrument."

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"In the view I have taken of the matter, it is unnecessary to determine whether the plaintiff, as holder in due course of the note, is bound by the provisions of the definition of trust contained in the trustees from personal liability. The statute effectually does that it they are to their signatures words indicating that they sign in a representative capacity, disclose their principal, and are duly authorized. Respecting the obligations upon which this cause of action is predicated, the defendants have asked to their signatures words indicating that they signed in a representative capacity. They disclosed their principal, and they were duly authorized. Therefore they are not liable on the instrument."

In Charles Nelson Co. v. Morton, 288 Pac. 845, where

the note was signed "Trustees of Greater San Francisco Speedway Association [a trust] Fred Morton, Pres. C. C. Loser, sec.," and the trust involved was a pure trust to build a speedway, which had power to issue notes and borrow money, the court, adopting in large measure the opinion of the trial court, quoted therefrom as follows, on pp. 849-50:

"But the law itself makes section 3101, Civil Code, part of the note, and that section is to be liberally construed in the interest of harmony. Hence, when the note and the statute are read together, with a liberal interpretation given to the word 'principal,' there is no variance of the terms of the note. The statute, liberally construed, says in substance that when the estate [or principal] is disclosed either in the body of the instrument or in the form of the signature, exemption from personal liability follows as effectually as if, after signing his name, the trustee had added, 'as trustee but not individually' or 'as trustee but not otherwise.'"

* * * *

"In the interest of commerce, it has been the policy of the law to exercise great tenderness toward the holders of commercial paper. Yet, after all, there is nothing sacrosanct about a promissory note; and section 20 of the Negotiable Instruments Act was meant to banish some of the extreme technicality which had led to confusion and incongruities in adjudicated cases in different jurisdictions. The provision granting personal exemption when the note indicates on its face that it was made on behalf of a disclosed principal, or by one filling a disclosed representative character and acting in his representative capacity, effectuates the desuetude of a vast array of technical and confusing precedents.

"Decisions, for example, may easily be found declaring that unless disclosure of the principal is made in the body of the note, the agent, whatever his powers, does not succeed in avoiding liability for himself by words of designation or description annexed to his signature. But the statute now provides that if proper indication of the representative capacity of the signer is given either in the note or in the signature the disclosure is sufficient for his relief. Any phraseology which 'indicates' to the ordinary mind that the signature is made in a representative capacity will suffice for the purpose; and all persons dealing with the note are bound to take cognizance of its indications and disclosures.

"In the note before us it would be vain to deny that the signature indicated the representative character of the signers, and at the same time met fully the requirements of the law in disclosing 'the principal' to be bound. The signature gave the business name of the principal, and that principal was specifically designated as 'A trust.' Consequently, when the Charles Nelson Company accepted transfer of the note from the payee, The Charles Nelson Company was charged with notice that Morton and Loser, describing themselves respectively as president and secretary of

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"In the interest of commerce, it has been the policy of the law to exercise great tenderness toward the holders of commercial paper. Yet, after all, there is nothing so essential about a promissory note; and section 30 of the Uniform Commercial Code was meant to punish some of the extreme technical cases which had led to confusion and inconsistency in adjustment of different jurisdictions. The provision granting personal exemption when the note indicates on its face that it was made on behalf of a disclosed principal, or by one filling a disclosed representative character and acting in his representative capacity, effectuates the desirability of a vast array of technical and confusing precedents.

"Decisions, for example, may easily be found declaring that unless disclosure of the principal is made in the body of the note, the agent, whatever his powers, does not succeed in avoiding liability for himself by words of designation or description annexed to his signature. But the statute now provides that proper indication of the representative capacity of the signer is given either in the note or in the signature the disclosure is sufficient for his relief. Any phraseology which 'indicates' the ordinary mind that the signature is made in a representative capacity will suffice for the purpose; and all persons dealing with the note are bound to take cognizance of the indication and disclosure.

"In the note before us it would be vain to deny that the signature indicated the representative character of the signer, and at the same time was fully the requirement of the law in disclosing 'the principal' to be bound. The statute gave the business name of the principal, and that principal was specifically designated as 'A trust.' Consequently, when the trustee Nelson Company accepted transfer of the note from the payee, The Charles Nelson Company was charged with notice that Morton and Jones, described themselves respectively as president and secretary of

the 'Trustees of Greater San Francisco Speedway Association, a Trust,' were acting not as principals, but in alieno jure for a named trust and that by force of the statute they were exempted from personal liability as fully as if the note had formally stated in its body that the obligation was that of the trustees 'in their capacity as trustees and not otherwise' or 'as trustees but not as individuals.'

"While they are not agents, the trustees have their duties to perform; and the effect of the statute is to charge them in respect of the property to which their representative duties attach; and not to require payment out of their private funds, in the event that the trust property should prove insufficient. In a case of agency, there is a principal to be charged; and in the case of a trusteeship there is the trust estate. The representative character in both cases has such kinship that under the broad language of the statute no well-founded distinction can be made as to the exemption from liability."

Inasmuch as Albina Palecek Norris was authorized to execute the note in behalf of the trust estate and she signed same in a representative capacity, disclosing by her signature on the face of the note the name of the estate, in our opinion no individual liability attached by reason of her execution of the note.

Other points are urged, but in the view we take of this cause we deem further discussion unnecessary.

For the reasons stated the judgment of the circuit court is reversed and the cause remanded with directions to disallow the claim.

REVERSED AND REMANDED.

Friend and Scanlan, JJ., concur.

the 'Trustees of Greater San Francisco' as a body, association, a trust, 'were acting not as principals, but in alien trust for a named trust and that by force of the statute they were exempted from personal liability as fully as if the note had formally stated in its body that the obligation was that of the trustees in their capacity as trustees and not otherwise, or as trustees but not as individuals.'

"While they are not agents, the trustees have their duties to perform; and the effect of the statute is to charge them in respect of the property to which their representative duties attach; and not to require payment out of their private funds, in the event that the trust property should prove insufficient. In a case of agency, there is a principal to be charged; and in the case of a trusteeship there is the trust estate. The representative character in both cases has such kinship that under the broad language of the statute no well-founded distinction can be made as to the exemption from liability."

Inasmuch as Alfred Belcher Morris was authorized to execute the note in behalf of the trust estate and the signed same in a representative capacity, disavowing by his signature on the face of the note the name of the estate, in our opinion no individual liability attached by reason of her execution of the note.

Other points are raised, but in the view we take of this cause we deem further discussion unnecessary. For the reasons stated the judgment of the circuit court is reversed and the cause remanded with direction to disallow the claim.

HAYWARD AND WELLS, J.

Wright and Norman, J., concur.

JOHN WIEDEMAYER,
Appellee,

vs.

MRS. JOHN VIVIER and MUNICIPAL
EMPLOYEES' ANNUITY AND BENEFIT
FUND OF CHICAGO,
Defendants Below.

MRS. JOHN VIVIER,
Appellant.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

287 I.A. 628¹

MR. PRESIDING JUSTICE SULLIVAN
DELIVERED THE OPINION OF THE COURT.

Plaintiff, John Wiedemeyer, brought an action in the Municipal court against defendant, Mrs. John Vivier, for moneys alleged to have been advanced to her in the months of October, November and December, 1934, during the life of her former husband. Defendant being a nonresident of Illinois, plaintiff filed an affidavit for a writ of attachment in aid, in which the Municipal Employees' Annuity and Benefit Society was named as garnishee. The garnishee filed its appearance and answer, and, subsequent to service by publication, defendant filed her appearance and affidavit of merits to plaintiff's amended statement of claim. The Retirement Board of the Municipal Employees' Annuity and Benefit Fund of Chicago, designated and served as garnishee under the name of the Municipal Employees' Annuity and Benefit Society, in its answer to the writ of attachment in aid, stated "that the said Retirement Board has in its control and under its supervision the sum of \$715.52 belonging to said Mrs. John Vivier (known to the garnishee as Mrs. Betty Wiedemeyer) due and payable to her as a refund under certain provisions of the law governing the Municipal Employees' Annuity and Benefit Fund of Chicago." Upon trial of the original action upon its merits by the court without a jury on November 19, 1935, the issues were found in

JOHN WIDEMAYER,
Appellant,

vs.

MRS. JOHN VIVIER and MUNICIPAL
EMPLOYEES' ANNUITY AND BENEFIT
FUND OF CHICAGO,
Defendants Below.

MRS. JOHN VIVIER,
Appellant.

287 I.A. 628

THE PRESIDING JUDGE CALLS
FOR THE OPINION OF THE COURT.

Plaintiff, John Widemayer, brought an action in the
Municipal court against defendant, Mrs. John Vivier, for
alleged to have been advanced to her in the months of October,
November and December, 1934, during the life of her former hus-
band. Defendant being a non-resident of Illinois, plaintiff
filed an affidavit for a writ of attachment in this court and
Municipal Employees' Annuity and Benefit Society was named as
garnishee. The garnishee filed its answer and counter claim,
subsequent to service by publication, defendant filed her an-
swer and affidavit of merits to plaintiff's amended statement
of claim. The Retirement Board of the Municipal Employees' Annuity
and Benefit Fund of Chicago, designated and served as garnishee
under the name of the Municipal Employees' Annuity and Benefit
Society, in its answer to the writ of attachment in this court
stated that the said Retirement Board was in the control and under the
supervision the sum of \$10.00 belonging to said Mrs. John Vivier
(known to the garnishee as Mrs. Betty Widemayer) and was payable
to her as a refund under certain provisions of the law governing
the Municipal Employees' Annuity and Benefit Fund of Chicago.
Upon trial of the original action upon its merits by the court
without a jury on November 19, 1937, the issues were found in

favor of plaintiff and judgment entered against defendant for \$1000. Immediately after entry of this judgment the court entered ^{judgment} against the garnishee defendant upon its answer for \$715.52 for the use of plaintiff. Both judgments were included in the one judgment order. It is only from the judgment against garnishee that the defendant, Mrs. Vivier, prosecutes this appeal.

Defendant contends that the funds in the possession of garnishee sought to be garnished are exempt from garnishment and attachment under para. 797, sec. 60 of the act governing the Municipal Employees' Annuity and Benefit Fund of Chicago, (ch. 24, Ill. State Bar Stats. 1935) which is, in part, as follows:

"All annuities, pensions, and disability benefits granted under the provisions of this Act and every portion of such annuities, pensions, and benefits, shall be exempt from attachment or garnishment process * * *."

Plaintiff's answer to defendant's contention as stated in his brief is as follows: "When the widow of a member of the Municipal Employees' Annuity and Benefit Fund of Chicago remarries, she is ipso facto no longer considered a beneficiary or annuitant under the act creating the Municipal Employees' Annuity and Benefit Fund of Chicago. From the moment of her remarriage she can no longer claim the rights of a beneficiary or an annuitant. The act specifically terminates that status. Her only remaining right under the act is to a refund, if any exists. This refund under the statute is the difference between the amount accumulated from the sums deducted from her husband's salary and the amount paid to her while she was a widow entitled to an annuity. In the case at bar, the Municipal Employees' Annuity and Benefit Fund of Chicago became the debtor of Mrs. Vivier, the former widow of John Wiedemeyer, for a refund of \$715.52. This sum belonged to Mrs. Vivier absolutely and without restrictions.

"Mrs. John Vivier filed an affidavit of merits to the

favor of plaintiff and judgment entered against defendant for \$1000. Immediately after entry of this judgment the court entered judgment against the garnishee defendant upon its answer for \$715.32 for the use of plaintiff. Both judgments were included in the one judgment order. It is only from the judgment against garnishee that the defendant, Mrs. Vivier, prosecutes this appeal.

Defendant contends that the funds in the possession of garnishee sought to be garnished are exempt from attachment and attachment under para. 797, sec. 30 of the act governing the Municipal Employees' Annuity and Benefit Fund of Chicago, (Ch. 24, Ill. State Bar State, 1935) which is, in part, as follows:

"All annuities, pensions, and disability benefits created under the provisions of this Act and every portion of such annuities, pensions, and benefits, shall be exempt from attachment or garnishment process * * *."

Plaintiff's answer to defendant's contention as stated in his brief is as follows: "When the widow of a member of the Municipal Employees' Annuity and Benefit Fund of Chicago dies, she is deemed to no longer considered a beneficiary or annuitant under the act creating the Municipal Employees' Annuity and Benefit Fund of Chicago. From the moment of her remarriage she can no longer claim the rights of a beneficiary or an annuitant. The act specifically terminates that status. Her only remaining right under the act is to a refund, if any exists. This refund under the statute is the difference between the amount accumulated from the annuity deducted from her husband's salary and the amount paid to her while she was a widow entitled to an annuity. In the case at bar, the Municipal Employees' Annuity and Benefit Fund of Chicago became the debtor of Mrs. Vivier, the former widow of John Wieschever, for a refund of \$715.32. This sum belonged to Mrs. Vivier absolutely and without restrictions.

"Mrs. John Vivier filed an affidavit of assets to the

amended statement of claim filed by plaintiff. She did not file an answer to the garnishment proceeding. The only answer filed to the attachment was that of the Retirement Board of the Municipal Employees' Annuity and Benefit Fund of Chicago. Mrs. Vivier took no exceptions to the answer filed by the board. That answer clearly admits that the board is holding the sum of \$715.52 due and payable to her as a refund because she is no longer the widow of John Wiedemeyer. No issue having been joined upon the answer filed, the averment of facts therein stands admitted and must be taken as true.

"Mrs. Vivier made no objections to the answer filed by the Retirement Board of the Municipal Employees' Annuity and Benefit Fund of Chicago. She did not raise in the trial court any question as to the character of the refund or that it was exempt from garnishment. The questions presented on this appeal were not raised in the trial court and are now being urged for the first time."

Nowhere in the pleadings filed before the trial of this case or at any time during the course of the trial was the question raised as to the right of plaintiff to garnishee the funds in the possession of the garnishee belonging to Mrs. Vivier. Although the answer of the garnishee was filed July 10, 1935, stating that it had in its possession \$715.52 belonging to Mrs. Vivier and defendant's affidavit of merits was not filed until September 16, 1935, no question was raised therein by the defendant that the refund money in the hands of the garnishee belonging to Mrs. Vivier was exempt from garnishment. It is a settled rule of this court that a party will not be permitted to urge objections in a court of review which were not urged in the trial court. (Morey v. Brown, 305 Ill. 284.)

Assuming, however, that the question is properly before this court for review, were the funds in the hands of the garnishee belonging to defendant exempt from garnishment? Para. 795, sec.

amended statement of claim filed by plaintiff. She did not file an answer to the garnishment proceeding. The only answer filed to the attachment was that of the Retirement Board of the Municipal Employees' Annuity and Benefit Fund of Chicago. Mrs. Vivier took no exceptions to the answer filed by the board. That answer clearly admits that the board is holding the sum of \$715.52 due and payable to her as a refund because she is no longer the widow of John Klebe-mer. No issue having been joined upon the answer filed, the over-ment of facts therein stands admitted and must be taken as true. Mrs. Vivier made no objections to the answer filed by the Retirement Board of the Municipal Employees' Annuity and Benefit Fund of Chicago. She did not raise in the trial court any question as to the character of the refund or that it was exempt from garnishment. The questions presented on this appeal were not raised in the trial court and are now being raised for the first time. Answers in the pleadings filed before the trial of this case at any time during the course of the trial was the question raised as to the right of plaintiff to garnish the funds in the possession of the garnishee belonging to Mrs. Vivier. Although the answer of the garnishee was filed July 10, 1935, stating that it had in its possession \$715.52 belonging to Mrs. Vivier and defendant's affidavit of merits was not filed until September 12, 1935, no question was raised therein by the defendant that the refund money in the hands of the garnishee belonging to Mrs. Vivier was exempt from garnishment. It is a settled rule of this court that a party will not be permitted to raise objections in a court of review which were not urged in the trial court. (Murray v. Brown, 208 Ill. 284.) Assuming, however, that the question is properly before this court for review, were the funds in the hands of the garnishee belonging to defendant exempt from garnishment? Rev. 735, etc.

58, ch. 24, Illinois State Bar Stats., 1935, relating to the remarriage of the widow of a deceased member of the Municipal Employees Annuity and Benefit Fund is, in part, as follows:

"Notwithstanding the provisions of any other section or sections of this Act to the effect that any annuity for the widow of a municipal employee shall be a life annuity, any annuity which shall have been granted to a widow of a municipal employee under and by virtue of the provisions of this Act shall terminate when such widow shall marry and if any such widow who shall marry shall not have received, in form of annuity, an amount equal to that accumulated from the sums deducted from the salary of the municipal employee concerned and applied for the purpose of providing annuity for such widow, a sum equal to the difference between the amount accumulated from the sums deducted from the salary of the municipal employee concerned and applied for the purpose of providing annuity for such widow and the amount received by such widow in form of annuity shall be refunded to such widow." (Italics ours.)

It is readily apparent that para. 797 of ch. 24, heretofore quoted, dealing with the question of exemption from garnishment and attachment is not applicable to the situation presented here, since that section of the act only protects annuities, pensions and disability funds from garnishment and attachment, and the defendant in this case relinquished her status as an annuitant when she remarried. As long as she remained a widow, the statute protected the annuity which had been granted to her upon the death of her husband, not only from garnishment and attachment by her creditors but effectually prevented her as an annuitant from assigning or mortgaging in whole or part her interest in the annuity. The annuity payable to her as a widow ceased upon her remarriage. Her status as beneficiary was terminated. The only right or interest she had in the fund was to a refund, if such was due her, under para. 795. Any refund due her was her property. She could withdraw it, assign it or do with it as she saw fit. She was merely a creditor of the garnishee to the extent of the \$715.52 in its hands, which was clearly recoverable for plaintiff's use in part satisfaction of his principal judgment against defendant.

88, ch. 24, Illinois State Bar State, 1935, relating to the re-

marriage of the widow of a deceased member of the Municipal Employees

Annuity and Benefit Fund is, in part, as follows:

"Notwithstanding the provisions of any other section or sections of this Act to the effect that any annuity for the widow of a municipal employee shall be a life annuity, any annuity which shall have been granted to a widow of a municipal employee under and by virtue of the provisions of this Act shall terminate when such widow shall marry, and if any such widow shall marry shall not have received, in form of annuity, an amount equal to that accumulated from the sums deducted from the salary of the municipal employee concerned and applied for the purpose of providing annuity for such widow, a sum equal to the difference between the amount accumulated from the sums deducted from the salary of the municipal employee concerned and applied for the purpose of providing annuity for such widow and the amount received by such widow in form of annuity shall be refunded to such widow." (Illinois Code.)

It is readily apparent that para. 795 of ch. 24, therefore quoted, dealing with the question of exemption from attachment and attachment is not applicable to the situation presented here, since that section of the act only protects annuities, pensions and disability funds from garnishment and attachment, and the defendant in this case relinquished her status as an annuitant when she married. As long as she remained a widow, the statute protected the annuity which had been granted to her upon the death of her husband, not only from garnishment and attachment by her creditors but effectively prevented her as an annuitant from assigning or mortgaging in whole or part her interest in the annuity. The annuity payable to her as a widow ceased upon her remarriage. Her status as beneficiary was terminated. The only right or interest she had in the fund was to a refund, if such was due her, under para. 795. Any refund due her was her property. She could withdraw it, assign it or do with it as she saw fit. She was merely a creditor of the fund as to the extent of the \$715.82 in its hands, which was clearly recoverable for plaintiff's use in part satisfaction of his principal judgment against defendant.

Plaintiff's motion of March 27, 1936, to dismiss this appeal was reserved to hearing. We have given careful consideration to the motion and find that it possesses merit, but in view of the fact that we have decided the appeal on its merits, said motion will be denied.

For the reasons indicated herein the judgment of the Municipal court against the garnishee for the use of plaintiff, John Wiedemeyer, is affirmed.

AFFIRMED.

Friend and Scanlan, JJ., concur.

Plaintiff's motion of March 27, 1936, to dismiss this case was reserved to hearing. We have given careful consideration to the motion and find that it possesses merit, but in view of the fact that we have decided the appeal on its merits, said motion will be denied.

For the reasons indicated herein the judgment of the Municipal court against the garnishes for the use of plaintiff, John Wieschewsky, is affirmed.

ATTEST:

Friend and Sonnan, Jr., clerk.

38880

GEORGE F. BARRETT,
Appellee,

v.

JOSEPH FARINA, Jr., and
YOLANDA FARINA,
Appellants.

APPEAL FROM SUPERIOR
COURT, COOK COUNTY.

287 I.A. 628²

MR. PRESIDING JUSTICE SULLIVAN
DELIVERED THE OPINION OF THE COURT.

This appeal seeks to reverse an order entered by the superior court, March 5, 1936, approving the final report and account of the receiver of the property involved in this cause.

December 23, 1935, the receiver, L. G. Bergmann, filed her final report and account, to which Joseph Farina, Jr., and Yolanda Farina, his wife, defendants in this foreclosure proceeding, and the owners of the equity of redemption prior to the expiration of the period for redemption, filed the following objections:

"1. The Receiver hereunder was appointed December 29, 1933. A decree was subsequently entered and thereafter, on May 11, 1934, the premises were sold by the Master in Chancery to the Complainant herein. The Complainant herein likewise took a judgment at law in the Superior Court of Cook County, case No. 588496, entitled 'M. C. Barrett -vs- Joseph Farina, et al.,' and thereafter an Execution was issued on said judgment at law, and the Sheriff of Cook County, Illinois, did levy upon the real estate not involved in this proceedings, and did sell said real estate by virtue of said Execution. The Execution was returned satisfied in full, and the judgment at law was satisfied in full; that the debt represented by said judgment at law in the Superior Court of Cook County Case No. 588496, entitled 'M. C. Barrett -vs- Joseph Farina, et al.' is one and the same debt arising out of the foreclosure herein, and the satisfaction of said debt in the law suit likewise satisfied the debt in this proceeding.

GEORGE T. BARRETT,
Appellee,

v.

JOSEPH KARINA, Jr., and
YOLANDA KARINA,
Appellants.

APPEAL FROM CIRCUIT
COURT, COOK COUNTY.

287 I.A. 628

MR. PRESIDING JUSTICE, JUDICIAL
DEPARTMENT THE OFFICE OF THE COURT.

This appeal seeks to reverse an order entered by the
superior court, March 5, 1935, approving the final report and
account of the receiver of the property involved in this cause.
December 23, 1933, the receiver, L. G. Bergmann, filed
his final report and account, to which Joseph Karina, Jr., and
Yolanda Karina, his wife, defendants in this foreclosure pro-
ceeding, and the owners of the equity of redemption prior to
the expiration of the period for redemption, filed the follow-
ing objections:

"1. The Receiver Bergmann was appointed December 23,
1933. A decree was subsequently entered and thereafter, on
May 11, 1934, the premises were sold by the latter in Chicago
to the complainant herein. The complainant herein likewise
took a judgment at law in the Superior Court of Cook County,
Case No. 528490, entitled 'M. G. Barrett -vs- Joseph Karina,
et al.', and thereafter an execution was issued on said judgment
at law, and the sheriff of Cook County, Illinois, did levy upon
the real estate not involved in this proceeding, and did sell
said real estate by virtue of said execution. The execution was
returned satisfied in full, and the judgment at law was satisfied
in full; and the debt represented by said judgment at law in
the Superior Court of Cook County Case No. 528490, entitled
'M. G. Barrett -vs- Joseph Karina, et al.', is and was same
debt existing out of the foreclosure herein, and the satisfaction
of said debt in the law suit likewise satisfied the debt in this
proceeding.

"2. That the Receiver should have been discharged on the date of the sale and satisfaction of the judgment at law, viz; October 9, 1934, but that the said Receiver has been wrongfully collecting the rents after the entire debt had been satisfied and discharged of record.

"3. That the Receiver did, on July 12, 1934, pay the sum of \$196.04 on account of the general taxes for the first half of the year 1932; pay the further sum of \$193.14 on account of the general taxes for the second half of the year 1932, and paid the further sum of \$226.50 on account of the balance due on the 1930 taxes, which said sums were paid after a sale of the premises in this foreclosure proceedings, and the said payments were made contrary to law.

"4. That the Receiver, subsequent to the sale of the premises herein, on April 29, 1935, made a capital improvement to the premises in the purchase of a refrigerator for the sum of \$87.50, which thereby enhanced and increased the value of the property, but that the said expenditure was unlawful and diverted the funds in the hands of the Receiver from these objectors, who are rightfully entitled thereto, to the use of the purchaser at the Master's Sale.

"5. That the Receiver has unlawfully expended for said taxes and the purchase of the refrigerator after the sale of the premises herein by the Master, the sum of \$703.18, which sum should be ordered to be paid into this estate for the use and benefit of these objectors, who were the owners of the equity herein.

"6. These objectors therefore pray the Court to enter an Order directing the Receiver herein and his sureties to pay the sum of \$703.18, or such sum as shall be found to have been unlawfully expended by said Receiver, into this estate, and the said money be paid to these objectors, as the owners of the equity of redemption."

The trial court in its order of March 5, 1936, approving the final report and account of the receiver, discharging her and relieving her surety of all liability on her bond, found inter alia that "pursuant to a general order of this court ^{on} entered/October 16, 1933, said receiver" paid the first installment of the 1932 general real estate taxes amounting to \$196.04, the second installment of the 1932 taxes amounting to \$193.40, and the balance of the 1930 taxes, amounting to \$226.60; that such payments were made after sale and during the redemption period; that there was in full force and effect the general order above mentioned, which was entered by the executive committee of the superior court October 16, 1933, and directed all receivers

"2. That the Receiver should have been discharged on the date of the sale and satisfaction of the judgment at law, viz: October 9, 1934, but that the said Receiver has been wrongfully collecting the rents after the entire debt had been satisfied and discharged of record.

"3. That the Receiver did, on July 12, 1934, pay the sum of \$138.04 on account of the general taxes for the first half of the year 1933; pay the further sum of \$137.14 on account of the general taxes for the second half of the year 1933, and paid the further sum of \$286.80 on account of the balance due on the 1930 taxes, which said sums were paid after a sale of the premises in this foreclosure proceeding, and the said payments were made contrary to law.

"4. That the Receiver, subsequent to the sale of the premises herein, on April 29, 1935, made a capital improvement to the premises in the purchase of a refrigerator for the sum of \$87.50, which thereby enhanced and increased the value of the property, but that the said expenditure was unlawful and diverted the funds in the hands of the Receiver from those of the objectors, who are rightfully entitled thereto, to the use of the purchaser at the Master's sale.

"5. That the Receiver has unlawfully expended for said taxes and the purchase of the refrigerator after the sale of the premises herein by the Master, the sum of \$703.48, which sum should be ordered to be paid into this estate for the use and benefit of these objectors, who were the owners of the equity herein.

"6. These objectors therefore pray the Court to enter an order directing the Receiver herein and his trustees to pay the sum of \$703.48, or such sum as shall be found to have been unlawfully expended by said Receiver, into this estate, and the said money be paid to these objectors, or the owners of the equity of redemption."

The trial court in its order of March 5, 1936, approving

the final report and account of the receiver, discharging her

and relieving her surety of all liability on her bond, found

that "payment to a general order of this court

entered October 16, 1935, said receiver" paid the first instal-

ment of the 1933 general real estate taxes amounting to \$138.04,

the second instalment of the 1933 taxes amounting to \$137.14,

and the balance of the 1930 taxes, amounting to \$286.80; that

such payments were made after sale and during the redemption

period; that there was in full force and effect the general

order above mentioned, which was entered by the executive committee

of the superior court October 16, 1935, and directed all receivers

of that court to pay 75% of the net income from the property under their control as taxes; that "said payments on account of general real estate taxes so made, pursuant to said order, were proper expenditures of the receiver;" and that the purchase of a refrigerator for \$87.50 by the receiver after sale and during the redemption period was a proper expenditure "for the purpose of keeping the premises in a rentable condition" and was properly charged against income from said premises.

Defendants contend that the receiver had no right to pay taxes on the premises after sale and during the redemption period; that the receiver had no right to make a capital investment for the improvement of the property during the redemption period by purchasing the refrigerator; that the deficiency decree entered in this cause had been satisfied by a levy on other property; and that these defendants were entitled to receive the net rents during the redemption period, including the amounts expended by the receiver in payment of the aforesaid taxes and the purchase of the refrigerator.

In the brief filed by the law firm of Barrett, Barrett, Costello & Barrett, as attorneys for "appellee" under "appellee's" theory, we find the following:

"George F. Barrett, as sole appellee, contends that the judgment and order entered below should be affirmed on the following grounds:

"1. That the receiver, L. G. Bergmann, is the only person against whom any relief is asked, and is a necessary party to this appeal.

"2. That the sole relief asked in this court is the reversal of the order entered on March 5, 1936, approving the Final Report and Account of the receiver, and the payment of the general taxes, and that the receiver be ordered to pay over to the appellants said monies so paid out; that in the absence of said L. G. Bergmann, receiver, as a party to this appeal, this Court is without jurisdiction, power or authority to grant said relief, or any relief, on this record.

of that court to pay 15% of the net income from the property under their control as taxes; that "said payments on account of general real estate taxes to said receiver to hold order, were proper expenditures of the receiver;" and that the purchase of a refrigerator for \$27.50 by the receiver after sale and during the redemption period was a proper expenditure "for the purpose of keeping the premises in a rentable condition" and was properly charged against income from said premises.

Defendants contend that the receiver had no right to pay taxes on the premises after sale and during the redemption period; that the receiver had no right to make a capital investment for the improvement of the property during the redemption period by purchasing the refrigerator; that the deficiency decree entered in this cause had been satisfied by a levy on other property; and that these defendants were entitled to receive the net rents during the redemption period, including the amounts expended by the receiver in payment of the stateaid taxes and the purchase of the refrigerator.

In the brief filed by the law firm of Barrett, Barrett, Costello & Barrett, as attorneys for "appellees" under "appellee's" theory, we find the following:

- "George W. Barrett, as sole appellee, contends that the judgment and order entered below should be affirmed on the following grounds:
- "1. That the receiver, I. G. Bergmann, is the only person against whom any relief is asked, and is a necessary party to this appeal.
 - "2. That the sole relief asked in this court is the reversal of the order entered on March 2, 1935, approving the final Report and account of the receiver, and the payment of the general taxes, and that the receiver be ordered to pay over to the appellants said monies so paid out; that in the absence of said I. G. Bergmann, receiver, as a party to this appeal, this Court is without jurisdiction, power or authority to grant said relief, or any relief, on this record.

"3. That appellants' abstract is entirely insufficient to present the grounds relied upon for a reversal, and in the absence of a certificate of evidence, this Court will presume that the action of the Chancellor was proper.

"4. That the taxes were paid by the receiver under an order of Court, and there is nothing in the record presented to this court to show, either that the deficiency judgment was satisfied or that the appellants were the owners of the equity of redemption.

"5. That the receiver is fully protected by the order of Court and cannot be held personally responsible for the repayment of the taxes."

Even a casual examination of the record is convincing that the first three of the above enumerated grounds are frivolous. George F. Barrett, plaintiff in the foreclosure proceeding, purchaser at the master's sale of the property involved, and the recipient of the master's deed to this property upon the expiration of the redemption period, was and is a member of the above mentioned law firm, which represented the receiver in the presentation of her final report and account and in the preparation and presentation of the order approving said report and account. George F. Barrett, as the plaintiff in the foreclosure proceeding, had no direct interest in the issues raised by the objections to the receiver's final account. His rights in the foreclosure proceeding had long since been fully adjudicated and his only apparent interest in the order appealed from was as one of the attorneys for the receiver. The notice served on the Barrett law firm of the notice of appeal specifically stated that the appeal was taken from the order overruling defendants' objections to the final report and account of the receiver and approving such final report and account. How can it be seriously urged that George F. Barrett is an appellee in this proceeding? The Civil Practice act provides that "notice of appeal" may be served on the attorney of record for the appellee, as well as on the appellee personally. The Barrett law firm, as attorneys for the receiver, the only appellee in this case, was served with a copy of the notice of

"3. That appellants' abstract is entirely insufficient to present the grounds relied upon for a reversal, and in the absence of a certificate of evidence, this Court will presume that the action of the Chancellor was proper.

"4. That the taxes were paid by the receiver under an order of Court, and there is nothing in the record presented to this Court to show, either that the delinquency judgment was satisfied or that the appellants were the owners of the equity of redemption.

"5. That the receiver is fully protected by the order of Court and cannot be held personally responsible for the payment of the taxes."

Even a casual examination of the record is convincing that

the first three of the above enumerated grounds are frivolous.

George R. Barrett, plaintiff in the foreclosure proceedings, pur-

chaser at the master's sale of the property involved, and the

recipient of the master's deed to this property upon the expiration

of the redemption period, was and is a member of the above mentioned

law firm, which represented the receiver in the presentation of her

final report and account and in the preparation and presentation of

the order approving said report and account. George R. Barrett,

as the plaintiff in the foreclosure proceedings, had no direct interest

in the issues raised by the objections to the receiver's final account

His rights in the foreclosure proceedings had long since been fully

adjudicated and his only apparent interest in the order appealed from

was as one of the attorneys for the receiver. The notice served on

the Barrett law firm of the notice of appeal specifically stated that

the appeal was taken from the order overruling defendants' objections

to the final report and account of the receiver and approving such

final report and account. How can it be seriously urged that George

R. Barrett is an appellee in this proceeding? The civil practice act

provides that "notice of appeal" may be served on the attorney of

record for the appellee, as well as on the appellee personally.

The Barrett law firm, as attorneys for the receiver, the only

appellee in this case, was served with a copy of the notice of

appeal. The only possible pretext for George F. Barrett characterizing himself as an or the "only" appellee before this court is that the word "appellee" inadvertently appears under his name in the title of the cause on the notice of appeal. It is idle to urge that there is or could be any other appellee on the issues presented to this court by this appeal than the receiver. The Barrett law firm represented the receiver in the trial court and it represents the receiver here and the receiver only.

In the third ground, above stated, reference is made to the absence of a certificate of evidence from the record and it is urged that because of such absence this court must presume that the order appealed from was properly entered. This point is urged in spite of the fact that the order itself is silent as to the presentation of any evidence and contains the following recital:

"This cause coming on to be heard upon motion of L. G. Bergman, receiver herein, and upon said receiver's Final Report and Account heretofore filed herein, and upon objections to said Final Report and Account of Joseph Farina, Jr., and Yolanda Farina, his wife, by their attorneys, Abrams, Sherman and Lewis and Alexander H. Glick, it appearing to the court that due notice hereof has been served upon all of the attorneys of record herein, and the court having examined and considered said Final Report and Account and having heard the arguments of counsel relative thereto, and being fully-advised in the premises, finds: * * *"

It is fair to assume from this recital that no evidence was presented to the chancellor and counsel for appellee must have known that such was the fact when appellee's brief was written. Therefore, it was improper for counsel for appellee to repeatedly attempt by the language used in her brief to convey the impression or to suggest the inference that evidence was presented at the hearing on defendants' objections to the approval of the receiver's final account, which was not included in the record filed in this court.

The principal question presented for our determination is whether the receiver had the right to pay taxes during the redemption

appeal. The only possible pretext for George F. B. Frost characterizing himself as an or the "only" appellee before this court is that the word "appellee" inadvertently appears under his name in the title of the cause on the notice of appeal. It is idle to urge that there is or could be any other appellee on the issues presented to this court by this appeal than the receiver. The Barrett law firm represented the receiver in the trial court and it represents the receiver here and the receiver only.

In the third ground, above stated, reference is made to the absence of a certificate of evidence from the record and it is urged that because of such absence this court must presume that the order appealed from was properly entered. This point is urged in spite of the fact that the order itself is silent as to the presentation of any evidence and contains the following recital:

"This cause coming on to be heard upon motion of L. O. Bergman, receiver herein, and upon said receiver's Final Report and Account heretofore filed herein, and upon objections to said Final Report and Account of Joseph T. Harris, Jr., and Yolanda Harris, his wife, by their attorneys, Abraham, Herman and Lewis and Alexander H. Glick, it appearing to the court that due notice heretofore has been served upon all of the attorneys of record herein, and the court having examined and considered said final report and account and having heard the arguments of counsel relative thereto, and being fully advised in the premises, it is ordered: * * *

It is fair to assume from this recital that no evidence was presented to the chancellor and counsel for appellee must have known that such was the fact when appellee's brief was written. Therefore, it was improper for counsel for appellee to repeatedly attempt by the language used in her brief to convey the impression or to suggest the inference that evidence was presented at the hearing on demand, and objections to the approval of the receiver's final account, which was not included in the record filed in this court.

The principal question presented for our determination is whether the receiver had the right to pay taxes during the redemption

period and whether she had the right to rely for protection in making such payments upon the blanket order entered October 16, 1933, by the executive committee of the superior court which directed receivers of that court to pay taxes.

It has been uniformly held by the courts of review of this state that a receiver has no right to pay taxes after sale and during the redemption period. In Stevens v. Hadfield, 196 Ill. 253, the court said at p. 256:

"We said in Davis v. Dale, 150 Ill. 239: 'The owner of the equity of redemption was entitled to receive the rents thereof after the sale and until the time of redemption expired;' and in Stevens v. Hadfield, *supra*: 'Eggleston, the purchaser at foreclosure sale, had no claim to these rents by virtue of his purchase.' In other words, the receiver held the money received as rents and profits for the holder of the equity of redemption, subject only to the payment of such proper charges against it as might be allowed by the court, and not in any sense, for the benefit of the purchaser at the foreclosure sale."

To the same effect are Bothman v. Lindstrom, 221 Ill. App. 262; Wolf v. Fischman, 273 Ill. App. 237; Builder's Bond & Mtg. Co. v. Bickley, 274 Ill. App. 638.

The receiver states in her brief that "she does not find it necessary to invoke any denial" of the rule as above stated and approved by the cases cited, but insists that inasmuch as she paid the taxes under the general order of the executive committee of the superior court she cannot be held personally responsible and be compelled to repay moneys so applied by her to the payment of said general real estate taxes. The receiver then goes on in her brief to advance the following reasons why the rule prohibiting a receiver from paying taxes after sale out of the income from the property is not applicable to her.

"First: The appellants do not show that they were owners of the equity of redemption, and as such entitled to the rents collected by the receiver.

"Second: They do not show that the deficiency judgment was paid.

period and whether she had the right to keep for redemption in making such payments upon the plaintiff's order dated October 16, 1933, by the executive committee of the superior court which directed receivers of that court to pay taxes.

It has been uniformly held by the courts of review of this state that a receiver has no right to pay taxes after sale and during the redemption period. In Stevens v. Hofffield, 190 Ill. 521, the court said at p. 526:

"We said in Davis v. Dale, 150 Ill. 232: 'The owner of the equity of redemption was entitled to receive the rents therefor after the sale and until the time of redemption expired;' and in Stevens v. Hofffield, supra, the purchaser as foreclosure sale, had no claim to these rents by virtue of his purchase.' In other words, the receiver held the money received as rents and profits for the holder of the equity of redemption, subject only to the payment of such proper charges as might be allowed by the court, and not in any case, for the benefit of the purchaser at the foreclosure sale."

To the same effect are Bottoman v. Lindstrom, 241 Ill. App. 682; Holt v. Wisneman, 273 Ill. App. 237; Walsh's Bond & Mort. Co. v. Bickley, 244 Ill. App. 638.

The receiver stated in her brief that "she does not find it necessary to invoke any denial" of the rule as above stated and approved by the cases cited, but insists that inasmuch as she paid the taxes under the general order of the executive committee of the superior court she cannot be held personally responsible and be compelled to repay moneys so applied by her to the payment of said general real estate taxes. The receiver then goes on in her brief to advance the following reasons why the rule prohibiting a receiver from paying taxes after sale out of the income from the property is not applicable to her:

"First: The appellants do not show that they were owners of the equity of redemption, and as such entitled to the rents collected by the receiver.
"Second: They do not show that the delinquent interest was paid."

Third: The record does not show the terms of the trust deed which was foreclosed.

"Fourth: The record does not show what the terms of the order appointing the receiver were."

The above reasons are so obviously lacking in force that they merit little, if any, consideration. As owners of the equity of redemption the Farinas were made defendants in the foreclosure proceedings, and the truth of the allegations contained in their written objections to the receiver's final account that they were the former owners of such equity and that the deficiency judgment had been paid, not having been denied or questioned in the trial court, cannot be questioned for the first time on appeal. Why the record should show the terms of the trust deed, which was foreclosed, as having any bearing upon the matter now before us, we are at a loss to understand. We will have to assume that the order appointing the receiver was in all respects lawful and did not direct her to perform an unlawful act.

Counsel for the receiver did not secure a specific order in this cause prior to her payment of the taxes after sale and during the redemption period authorizing her to pay such taxes, but claim that she relied entirely on the general order of the executive committee of the superior court as her authority. Did that general order authorize the payment of the taxes in question and afford the receiver protection against having her final account surcharged to the extent of the taxes so paid?

In view of the long and well established rule of law that a receiver cannot pay taxes after sale and during the redemption period, could it possibly have been within the contemplation of the executive committee of the superior court that this general order was a direction to receivers of that court to pay taxes after sale? We think not. Any direction to that effect was

Third. The record does not show the terms of the trust deed which was foreclosed.

"Fourth: The record does not show that the terms of the order appointing the receiver were."

The above reasons are so obviously lacking in force that they merit little, if any, consideration. As matters of the competency of the receiver were made defendants in the foreclosure proceedings, and the truth of the allegations contained in their written objections to the receiver's final account that they were the former owners of such equity and that the deficiency judgment had been paid, not having been denied or questioned in the trial court, cannot be questioned for the first time on appeal. If the record should show the terms of the trust deed, which was foreclosed, as having any bearing upon the matter now before us, we are at a loss to understand. We will have to assume that the order appointing the receiver was in all respects lawful and did not direct her to perform an unlawful act.

Counsel for the receiver did not secure a specific order in this cause prior to her payment of the taxes after sale and during the redemption period, authorizing her to pay such taxes, but claim that she relied entirely on the general order of the executive committee of the superior court as her authority. And that general order authorizes the payment of the taxes in connection and afford the receiver protection against having her final account surcharged to the extent of the taxes so paid?

In view of the long and well established rule of law that a receiver cannot pay taxes after sale and during the redemption period, could it possibly have been within the contemplation of the executive committee of the superior court that this general order was a direction to receivers or that court to pay taxes after sale? We think not. Any direction to that effect was

clearly null and void. In our opinion the executive committee of the superior court, by reason of the emergency then existing, intended by its general order to direct the receivers of that court to do what it could legally direct them to do and that was to pay taxes prior to the foreclosure sale. Regardless of how comprehensive the terms of the general order appear to be, counsel for the receiver must have known that the executive committee of the superior court could not extend the application of its order beyond the sale and through the redemption period in abrogation of the established law of the state.

In Bothman v. Lindstrom, supra, an order was entered by the chancellor authorizing and directing the receiver to pay current taxes and special assessments due on the property involved and to redeem same from a tax sale of December 8, 1916, as soon as sufficient funds were in the hands of the receiver to enable him to do so. The receiver redeemed from the tax sale, paid the general taxes for 1916 and the second installment of the special assessment mentioned. A decree of foreclosure and sale was entered, the property sold December 31, 1917, and a deficiency decree for \$1,000 entered against the mortgagors. Sometime during April, 1918, the receiver paid the general taxes for 1917, amounting to \$344.54 and the third installment of the special assessment, amounting to \$63.55. In considering the right and authority of the receiver to make the latter payments after the master's sale and during the redemption period, the court said at pp. 265-66:

"It is contended on behalf of the receiver that the court erred in refusing to give him credit for the general taxes for 1917 and for the third instalment of the special assessment, both paid by him in April, 1918, and in support of this it is argued that this payment was authorized by the order of court of August 7, 1917, from which we have quoted. Of course, it is the law that a receiver, who is an officer of the court, is subject to its orders, and if all parties are properly notified of the application for the order and the receiver is directed to make

clearly null and void. In our opinion the executive committee of the superior court, by reason of the emergency then existing, intended by its general order to direct the receivers of that court to do what it could legally direct them to do and that was to pay taxes prior to the foreclosure sale. Regardless of how comprehensive the terms of the general order appear to be, counsel for the receiver must have known that the executive committee of the superior court could not extend the application of its order beyond the sale and through the redemption period in violation of the established law of the state.

In Bothman v. Lindstrom, supra, an order was entered by the chancellor authorizing and directing the receiver to pay current taxes and special assessments due on the property involved and to redeem same from a tax sale of December 8, 1916, as soon as sufficient funds were in the hands of the receiver to enable him to do so. The receiver redeemed from the tax sale, paid the general taxes for 1916 and the second installment of the special assessment mentioned. A decree of foreclosure and sale was entered, the property sold December 21, 1917, and a deficiency decree for \$1,000 entered against the mortgagor. Sometime during April, 1918, the receiver paid the general taxes for 1917, amounting to \$344.54 and the third installment of the special assessment amounting to \$63.52. In considering the right and authority of the receiver to make the latter payments after the master's sale and during the redemption period, the court said at pp. 282-283:

"It is contended on behalf of the receiver that the court erred in refusing to give him credit for the general taxes for 1917 and for the third installment of the special assessment, both paid by him in April, 1917, and in support of this it is argued that this payment was authorized by the order of court of August 7, 1917, from which we have quoted. Of course, it is the law that a receiver, who is an officer of the court, is subject to its orders, and all parties are properly notified of the application for the order and the receiver is directed to make

payments, and no question is raised by any one in interest that such payments are improper, the receiver can rely upon the order of court. He must obey the order of court and obviously should not be penalized in these circumstances. Reardon v. Youngquist, 189 Ill. App. 3. But we think it also clear that the order entered was not sufficiently specific to authorize payment of the taxes and the instalment of the special assessment in 1918. We are of the opinion, upon an examination of the petition filed by the receiver and the order of court, that these payments were not in contemplation of the court when the order was entered, so that the receiver cannot rely upon such order."

But it is urged that the real custody of the funds in any receiver's hands is in the court and not with the receiver. That a receiver must obey the orders of the court and that expenditures made pursuant to such orders cannot be questioned on the receiver's accounting. It is also pointed out that the receiver's obedience to the order of the court is his sufficient protection and that this is true even if the order is erroneous and is subsequently reversed. (Reardon v. Youngquist, 189 Ill. App. 3.) The aforesaid general order either could not have been intended to apply to the payment of taxes by a receiver after sale or if it was so intended, it was null and void. Such is not the kind of an order that will protect a receiver from having her final account surcharged to the extent of the taxes illegally paid or that will estop the defendants from complaining of such illegal payments. When the receiver considered making the tax payments in question it was clearly her duty and the duty of her attorneys to make application in this cause upon notice for specific authority to make them. In our opinion in so far as the payment of taxes after sale by a receiver is involved it is only an order entered upon such an application, after notice to all parties concerned, where an opportunity is given to show the court why such order should not or could not legally be entered that affords protection to a receiver.

It will be noted that in Bothman v. Lindstrom, supra, the court, in discussing this question, said: "Of course, it is the

payments, and no question is raised by any one in respect of such payments are together, the receiver can rely upon the order of court. He must obey the order of court and pay accordingly. He is not to be troubled in these circumstances. Johnson v. Johnson, 189 Ill. App. 3. But we think it also clear that the order entered was not sufficiently specific to authorize payment of the taxes and the installment of the general assessment in 1918. We are of the opinion, upon an examination of the petition filed by the receiver and the order of court, that these payments were not in contemplation of the court when the order was entered, so that the receiver cannot rely upon such order.

But it is urged that the real ownership of the funds in any receiver's hands is in the court and not with the receiver. That a receiver must obey the order of the court and that such order must be pursuant to such order cannot be questioned on the receiver's account. It is also pointed out that the receiver's obedience to the order of the court is his legitimate protection and that this is true even if the order is erroneous and is subsequently reversed. (Johnson v. Johnson, 189 Ill. App. 3.) The respondent general order either could not have been intended to apply to the payment of taxes by a receiver or it is as intended, it is null and void. Such is not the kind of an order that will protect a receiver from having his final account subjected to the extent of the taxes illegally paid or that will keep the respondent from doing anything of such illegal nature. When the receiver was ordered making the tax payments in question it was clearly not only the duty of her attorney to make application in this court upon notice for specific authority to make them. In our opinion in so far as the payment of taxes after sale by a receiver is involved it is only an order entered upon such an application, after notice to all parties concerned, which an opportunity is given to show the court why such order should not be made and it will be entered that affords protection to a receiver.

It will be noted that in Johnson v. Johnson, supra, the court, in discussing this question, said: "Of course, it is the

law that a receiver, who is an officer of the court, is subject to its orders, and if all parties are properly notified of the application for the order and the receiver is directed to make payments, and no question is raised by any one in interest that such payments are improper, the receiver can rely upon the order of the court."

In Reardon v. Youngquist, supra, where the receiver's final account was approved, in passing upon the instant question, the court used this language at p. 13:

"Having had notice of the various petitions of the receiver for direction and authority to pay the various items now objected to, they are chargeable with notice of the orders entered. It was clearly the duty of appellees, if they desired to oppose the payment of those various items by the receiver out of the funds in his hands, to have opposed the entry of the order by showing to the court why it should not or could not legally be entered, or at least to have sought its vacation on motion and a showing. Failing in this they should have notified the receiver that they would hold him responsible for a misapplication of the funds, if he obeyed the order."

We are impelled to hold that the receiver had no authority to pay the taxes in question; that ~~her~~ payment of such taxes after sale and approval of sale and during the redemption period was in violation of the established law of this state; and that the general order entered by the executive committee of the superior court October 16, 1933, directing that 75% of the net rents collected by receivers of that court should be applied to the payment of taxes, could only have been intended to apply during the period of foreclosure and until the property was sold.

It is contended that the purchase of the refrigerator by the receiver April 29, 1935, was a capital investment and that the receiver had no right to make any such investment during the period of redemption. However, the court found in its order "that the acquisition of said refrigerator was necessary for the purpose of keeping the premises in a rentable condition." It is a matter of common knowledge that refrigerators are necessary equipment in

law that a receiver, who is an officer of the court, is subject to its orders, and if all parties are properly notified of the application for the order and the receiver is directed to make payments, and no question is raised by any one in interest that such payments are improper, the receiver can rely upon the order of the court."

In Reardon v. Youngblood, supra, where the receiver's final account was approved, in passing upon the instant question, the court used this language at p. 13:

"Having had notice of the various petitions of the receiver for direction and authority to pay the various items now objected to, they are chargeable with notice of the order entered. It was clearly the duty of appellees, if they desired to oppose the payment of those various items by the receiver out of the funds in his hands, to have opposed the entry of the order by showing to the court why it should not or could not legally be entered, or at least to have sought its vacation on motion and a showing. Failing in this they should have notified the receiver that they would hold him responsible for a misapplication of the funds, if he obeyed the order."

We are impelled to hold that the receiver had no authority to pay the taxes in question; that her payment of such taxes after sale and approval of sale and during the redemption period was in violation of the established law of this state; and that the general order entered by the executive committee of the superior court October 16, 1935, directing that 75% of the net rents collected by receivers of that court should be applied to the payment of taxes, could only have been intended to apply during the period of foreclosure and until the property was sold. It is contended that the purchase of the refrigerator by the receiver April 20, 1935, was a capital investment and that the receiver had no right to make any such investment during the period of redemption. However, the court found in its order "that the acquisition of said refrigerator was necessary for the purpose of keeping the premises in a rentable condition." It is a matter of common knowledge that refrigerators are necessary equipment in

modern apartments and no convincing reason has been shown why the finding of the chancellor in this respect should be disturbed.

For the reasons indicated herein that part of the order of the superior court approving the final report and account of the receiver as to the general real estate taxes paid by her on the property involved herein for the years 1930 and 1932 is reversed and the cause remanded with directions to sustain the objections of the defendants, Joseph Farina, Jr., and Yolanda Farina, to said portion of the final account of the receiver wherein she credits herself with the amounts paid by her for such taxes and to order the receiver to pay to defendants \$616.78, the amount wrongfully paid by the receiver for taxes during the redemption period, as set forth in her final account. In all other respects the order of the superior court is affirmed.

ORDER AFFIRMED IN PART AND REVERSED
IN PART AND CAUSE REMANDED WITH
DIRECTIONS.

Friend and Scanlan, JJ., concur.

modern appliances and to convert them into a modern
the finding of the chemist in this respect should be dis-
turbed.

For the reasons indicated herein last part of the order
of the superior court approving the final report and account of
the receiver as to the general real estate taxes paid by her on
the property involved herein for the years 1930 and 1931 is
reversed and the cause remanded with directions to sustain the
objections of the defendants, Joseph T. Tins, Jr., and Yolanda
Tins, to said portion of the final account of the receiver
wherein she credits herself with the amounts paid by her for
such taxes and to order the receiver to pay to defendants
\$16.73, the amount wrongfully paid by the receiver for taxes
during the redemption period, as set forth in her final account.
In all other respects the order of the superior court is affirmed.

ORDER AFFIRMED IN PART AND REVERSED
IN PART AND REMANDED WITH
DIRECTIONS.

Friend and Seelman, Jr., counsel.

38911

INTERNATIONAL FILTER CO.,
a corporation,
Appellant,

v.

ALLIED CONTRACTORS, INC.,
a corporation,
Appellee.

APPEAL FROM CIRCUIT
COURT, COOK COUNTY.

287 I.A. 628³

MR. PRESIDING JUSTICE SULLIVAN
DELIVERED THE OPINION OF THE COURT.

This is an action for damages for breach of a written contract brought by plaintiff, International Filter Company, against Allied Contractors, Inc., defendant. The court tried the case without a jury, and, after finding the issues in favor of plaintiff, entered judgment February 18, 1936, against defendant for nominal damages of \$10 and costs. This appeal seeks to reverse the judgment in so far as it limited and restricted the damages recoverable by plaintiff to such nominal sum of \$10. No question is raised on the pleadings.

Defendant filed pleas raising issues of fraud and public policy but introduced no evidence in support thereof. At the close of plaintiff's case defendant moved that the trial court find the issues in plaintiff's favor and assess merely nominal damages against defendant. In response to such motion the above finding and judgment were rendered.

May 23, 1927, the parties entered into the following written contract: "In consideration of the International Filter Co. furnishing the undersigned with proposal for filter equipment for Glencoe, Illinois, it is hereby agreed that the undersigned

APPEAL FROM CIRCUIT
COURT, COOK COUNTY.

287 I.A. 638

INTERNATIONAL FILTER CO.,
a corporation,
Appellant,
v.
ALLIED CONTRACTORS, INC.,
a corporation,
Appellee.

MR. JUSTICE SULLIVAN
DELIVERED THE OPINION OF THE COURT.

This is an action for damages for breach of a written contract brought by plaintiff, International Filter Company, against Allied Contractors, Inc., defendant. The court tried the case without a jury, and, after finding the issues in favor of plaintiff, entered judgment February 13, 1936, against defendant for nominal damages of \$10 and costs. This appeal seeks to reverse the judgment in so far as it limited and restricted the damages recoverable by plaintiff to such nominal sum of \$10. No question is raised on the pleadings. Defendant filed pleas raising issues of fraud and public policy but introduced no evidence in support thereof. At the close of plaintiff's case defendant moved that the trial court find the issues in plaintiff's favor and assess merely nominal damages against defendant. In response to such motion the above finding and judgment were rendered. May 23, 1937, the parties entered into the following written contract: "In consideration of the International Filter Co. furnishing the underlaid with proposal for filter equipment for Glenwood, Illinois, it is hereby agreed that the underlaid

will use said figures in proposal and if awarded the contract will place this business with the International Filter Co. at the prices named below.

"All materials and labor covered by Section 'E' of the Glencoe filtration specifications for the sum of Thirty Four Thousand Six Hundred Eighty (\$34,680) Dollars. Delivered and erected, not including any financing charges for engineering, selling of certificates, or interest on certificates."

It will be noted from the terms of the contract that defendant agreed, if it was awarded the contract by the village of Glencoe for the installation of the filter equipment, that plaintiff as defendant's subcontractor was to furnish "all materials and labor covered by section 'E' of the Glencoe filtration specifications" at the aggregate price of \$34,680. Defendant was awarded the contract by the village of Glencoe and it is conceded that it refused to permit plaintiff to perform the portion of the work stipulated in the above subcontract. Therefore, the only questions presented for our determination are the proper measure of the damages plaintiff is entitled to recover and the evidence necessary and competent to establish the amount of such damages.

Plaintiff's theory is (1) that defendant's breach of the contract entitled it to recover as substantial damages therefor the amount of the contract price less what it would have cost plaintiff to complete performance according to the terms of the contract; (2) that such cost of performance is properly proved by evidence as to the probable cost of the various items necessary to complete said performance; (3) that such probable cost may be established by the detailed calculations of an expert witness familiar with the fair and usual cost of such items; (4) that such detailed calculations prepared and reduced to writing at the time

will use said figures in proposal and it awarded the contract will place this business with the International Water Co. at the prices named below.

"All materials and labor covered by section '1' of the Glucose filtration specifications for the sum of thirty four thousand six hundred eighty (34,680) dollars, delivered and erected, not including any financing charges for machinery, selling of certificates, or interest on certificates."

It will be noted from the terms of the contract that

defendant agreed, if it was awarded the contract by the village

of Glucose for the installation of the filter equipment, that

plaintiff as defendant's subcontractor was to furnish "all materials and labor covered by section '1' of the Glucose filtration specifications"

at the aggregate price of \$34,680. Defendant was awarded

the contract by the village of Glucose and it is conceded that it

refused to permit plaintiff to perform the portion of the work

stipulated in the above subcontract. Therefore, the only questions

presented for our determination are the proper measure of the damages

plaintiff is entitled to recover and the evidence necessary and

competent to establish the amount of such damages.

Plaintiff's theory is (1) that defendant's breach of the

contract entitled it to recover an substantial damages therefor

the amount of the contract price less what it would have cost

plaintiff to complete performance according to the terms of the

contract; (2) that such cost of performance is properly proved

by evidence as to the probable cost of the various items necessary

to complete said performance; (3) that such probable cost may be

established by the detailed calculations of an expert witness

familiar with the fair and usual cost of such items; (4) that such

detailed calculations prepared and reduced to writing at the time

on work sheets may be read upon the trial by plaintiff's expert witness after a proper foundation has been laid; (5) that such work sheets are themselves competent evidence of the estimated cost of performance; and (6) that such proof of plaintiff's damages need not be to a degree of absolute certainty but only to a degree of reasonable approximation.

Plaintiff contends (1) that the trial court erroneously limited its recovery to nominal damages instead of assessing its damages in an amount that represented the difference between the contract price and what it would have cost plaintiff to perform the subcontract; and (2) that the trial court erroneously restricted it in its proof of damages by refusing to permit its witness to read from plaintiff's exhibits D and E for identification after a proper foundation had been laid and in refusing to admit in evidence said exhibits D and E.

Defendant's theory is that there was no legal proof of any actual damage to plaintiff and that the court did not err in awarding plaintiff only nominal damages, and in support of such theory it is urged that plaintiff failed to establish by competent evidence what it would have cost it to perform the subcontract; that the evidence before the court on behalf of plaintiff warranted only the assessment of nominal damages; that the court properly refused to receive in evidence plaintiff's exhibits D and E for identification (hereinafter for convenience referred to simply as exhibits D and E) upon the foundation then laid; that no ruling of the court was asked by plaintiff to permit its witness to read from plaintiff's exhibits D and E; and that as much force and effect should be given to a finding of the court as to the verdict of a jury.

That the proper measure of damages in this cause is the difference between the contract price of \$34,680 and what it would

on work sheets may be read upon the trial by Plaintiff's expert witness after a proper foundation has been laid; (3) that such work sheets are themselves competent evidence of the cost of performance; and (4) that such proof of Plaintiff's damages need not be to a degree of absolute certainty but only to a degree of reasonable approximation.

Plaintiff contends (1) that the trial court erroneously limited its recovery to nominal damages instead of awarding its damages in an amount that represented the difference between the contract price and what it would have cost Plaintiff to perform the subcontract; and (2) that the trial court erroneously restricted its proof of damages by refusing to permit its witness to read from Plaintiff's exhibits B and C for identification after a proper foundation had been laid and in refusing to admit in evidence said exhibits D and E.

Defendant's theory is that there was no legal proof of any actual damage to Plaintiff and that the court did not err in awarding Plaintiff only nominal damages, and in refusal of such recovery it is urged that Plaintiff failed to establish by competent evidence that it would have cost it to perform the subcontract; that the witness before the court on behalf of Plaintiff submitted only the assessment of nominal damages; that the court properly refused to receive in evidence Plaintiff's exhibits B and C for identification (Plaintiff's convenience referred to simply as exhibits B and C upon the foundation then laid; that no ruling of the court was asked by Plaintiff to permit its witness to read from Plaintiff's exhibits B and C; and that as much force and effect should be given to a finding of the court as to the verdict of a jury.

That the proper measure of damages in this case is the difference between the contract price of \$11,000 and what it would

have cost plaintiff to have done and completed the work according to the terms of the contract is not disputed, but defendant claims that plaintiff did not prove any damages under such measure by competent and relevant evidence.

As heretofore shown, the subcontract in question was entered into May 23, 1927, and the principal contract was awarded to defendant by the Village of Glencoe May 27, 1927. Plaintiff was ready, willing and able and offered to furnish the materials and labor as agreed, but according to defendant's second amended plea, filed June 12, 1934, it notified plaintiff shortly after May 25, 1927, "that the defendant refused to purchase any equipment or material or work or labor or services or other things whatsoever from the plaintiff and the defendant at no time received any material equipment, work, labor, services or any other thing whatsoever from the plaintiff." Thus, defendant's breach of its contract with plaintiff was practically contemporaneous with its execution.

Preston F. Pew testified in behalf of plaintiff that he was manager of the municipal division of the International Filter Company; that he was associated with said company when the subcontract with defendant was entered into, and had been with plaintiff for thirteen years at the time of the trial; that he was first employed by plaintiff as purchasing agent, in charge of the purchase of all materials and supplies going into the construction of filters and filter equipment and that it was also part of his duties to prepare estimates for bids on filter equipment for municipalities; that about six months after said employment he was placed in charge of construction work consisting of the installation of filter equipment, particularly municipal plants; that about two or three years later he was promoted to the position of manager of the municipal division, in charge of sales

have cost plaintiff to have done and completed the work according to the terms of the contract is not disputed, but defendant claims that plaintiff did not prove any damages under such measure by competent and relevant evidence.

As heretofore shown, the subcontract in question was entered into May 23, 1937, and the principal contract was awarded to defendant by the Village of Glencoe May 27, 1937. Plaintiff was ready, willing and able and offered to furnish the materials and labor as agreed, but according to defendant's second amended plea, filed June 12, 1934, it notified plaintiff shortly after May 25, 1937, "that the defendant refused to purchase any equipment or material or work or labor or services on other things whatsoever from the plaintiff and the defendant at no time received any material equipment, work, labor, services or any other thing whatsoever from the plaintiff." Thus, defendant's breach of its contract with plaintiff was practically contemporaneous with its execution.

Preston F. Fox testified in behalf of plaintiff that he was manager of the municipal division of the International Filter Company; that he was associated with said company when the subcontract with defendant was entered into, and had been with plaintiff for thirteen years at the time of the trial; that he was first employed by plaintiff as purchasing agent, in charge of the purchase of all materials and supplies going into the construction of filters and filter equipment; that it was also part of his duties to prepare estimates for filter equipment for municipalities; that about six months after his employment he was placed in charge of construction work consisting of the installation of filter equipment, notwithstanding that he had been in the position of manager of the municipal division, in charge of all

as well as construction and purchase of all equipment; that on May 23, 1927, and immediately prior thereto, he was in charge of the sales and construction of all municipal purification plants for plaintiff; and that plaintiff's subcontract price with defendant was set at \$34,680 as a result of his personal estimate of the elements included therein.

Plaintiff's exhibit D was marked for identification, and that portion of same which is pertinent here is as follows:

*Glencoe, Ill. 5/23/27.

Equipment	\$23,159
Erection	3,938
Hauling	400
Extra fits	100
3%	828
	<u>28,425</u>
+ 22	6,255.
	<u>34,680."</u>

Pew testified further that he prepared exhibit D on the date it bears and that the figures thereon furnished the basis for plaintiff's contract with defendant. The witness was permitted to refresh his recollection by examining the exhibit and to testify as to the items appearing thereon and that the figure \$6,255 opposite +22 represented the estimated profit on the job.

Plaintiff's exhibit E consists of sixteen pages of cost sheets, upon which are entries of detailed items from which were compiled the cost of the equipment and erection necessary for plaintiff's performance of its subcontract as shown on exhibit D. Pew testified that he personally prepared the first of these sheets showing the cost of the various items of equipment that went to make up the total estimated equipment cost of \$23,159, and that he compiled that sheet from other detailed sheets of exhibit E, which had been prepared and reduced to writing, either by himself or by plaintiff's estimator, now deceased, under his direct supervision, and that he personally checked each entry made by said estimator, finding the

as well as construction and purchase of all equipment; that on May 23, 1927, and immediately prior thereto, he was in charge of the sales and construction of all municipal purification plants for plaintiff; and that plaintiff's subcontract price with defendant was set at \$24,600 as a result of his personal estimate of the elements included therein.

Plaintiff's exhibit D was marked for identification, and that portion of same which is pertinent here is as follows:

"Chicago, Ill. 5/23/27.

Equipment	\$23,150
Erection	3,000
Hauling	400
Extra file	100
	800
	<u>36,450</u>
	34,600
	1,850

He testified further that he prepared exhibit D on the date it bears and that the figures therein furnished the basis for plaintiff's contract with defendant. The witness was permitted to refresh his recollection by examining the exhibit and to testify as to the figures appearing thereon and that the figure \$6,850 opposite +23 represented the estimated profit on the job. Plaintiff's exhibit E consists of sixteen pages of cost sheets, upon which are entries of detailed items from which were compiled the cost of the equipment and erection necessary for plaintiff's performance of its subcontract as shown on exhibit D. He testified that he personally prepared the list of these sheets showing the cost of the various items of equipment that were so made up the total estimated equipment cost of \$23,150, and that he compiled that sheet from other detailed sheets of exhibit D, which had been prepared and reduced to writing, either by himself or by plaintiff's estimator, now deceased, under his direct supervision, and that he personally checked each entry made by said estimator, finding the

same true and correct.

After the witness had stated that he could not testify from memory as to the various entries on the sheets comprising exhibit E that went to make up the total cost of equipment, erection, hauling, etc., appearing on exhibit D but that he could so testify by referring to the figures on the exhibit, he was then asked to refresh his recollection and to testify as to the items therein contained.

Pew obviously read from the first page^{of}/exhibit E, the following items as making up the total cost of equipment as shown on exhibit D: "The underdrain systems for the filters, \$1,184; sand 143 tons, \$651; the gravel, 114 tons, \$673; the wash troughs, castiron and supports, \$1,056; 4, 8 inch controllers at \$337.50 each, \$1,350; 4 operating tables at \$216, \$864; * * *. 4 loss of head and rate of flow indicating gauges, \$960; pipes and fittings, joints and supports, \$8,001; hydraulic filter valves, \$2,281; gate valves, \$2,025; check valves, \$315; small piping, priming, et cetera, \$200; 2 chemical feeders, screw type, \$600; chemical piping, \$50; one Clearwell depth gauge, indicating, \$75; one Clearwell depth gauge, recording, \$75; wash water gauge, mercury column, \$60; vacuum and pressure gauges in pump room, \$106; gasoline tank and supply line, \$100; one mechanical agitator, \$510; one Chlorinator, \$1,230; one 3 inch meter (Hersey), \$85; 2, 3 inch altitude valves, Gold and Anderson, \$334; laboratory equipment, \$374; total \$23,159."

Defendant's counsel interposed the objection that the witness was reading from the exhibit. The trial judge then stated: "Now, it is obvious that his testimony as to the items of equipment that he has not refreshed his memory and testified from his memory after refreshing it from the memorandum, but that he is reading them item by item."

The witness stated that as to the entries of the numerous

same time and correct.

After the witness had stated that he could not testify

from memory as to the various entries on the sheets comprising

Exhibit B that went to make up the total cost of a signpost, erection,

including, etc., appearing on exhibit B but that he could so testify by

referring to the figures on the exhibit, he was then asked to refresh

his recollection and to testify as to the items therein contained.

Now obviously read from the first page of Exhibit B, the follow-

ing items as making up the total cost of equipment as shown on exhibit

B: "The underground systems for the filters, 1,164; sand 143 tons,

651; the gravel, 114 tons, 473; the sand troughs, castration and

supports, 41,056; 4, 8 inch controllers at \$337.50 each, 1,150;

operating tables at \$16, 834; * * *. 4 tons of lead and rate

flow indicating gauges, 2960; pipes and fittings, joints and

supports, 28,001; hydraulic filter valves, 2,281; gate valves,

2,025; check valves, 4315; small piping, priming, et cetera, \$200;

chemical feeders, screw type, 6000; chemical piping, 20; one

level depth gauge, indicating, 75; one level depth gauge,

recording, 475; wash water gauge, mercury column, 60; vacuum and

pressure gauges in pump room, 102; gasoline tank and supply line,

100; one mechanical agitator, 2110; one chlorinator, 1,130; one 3

inch meter (Hercy), 85; 2, 3 inch flange valves, 60 and

Anderson, \$334; laboratory equipment, 2374; total \$2,125."

Defendant's counsel interposed the objection that the wit-

ness was reading from the exhibit. The trial judge then stated:

"Now, it is obvious that his testimony as to the items of equipment

that he has not refreshed his memory and testified from his memory

after refreshing it from the memorandum, but that he is reading

from item by item."

The witness stated that as to the entries of the memoranda

items and their costs on exhibit E that "I will say that I can't give them from memory nor can I study them and remember them, but I can read them off." The witness was not permitted to read from the exhibit the balance of the entries thereon.

Plaintiff then offered in evidence exhibits D and E and defendant's objection to the introduction of same was sustained.

As heretofore stated this action was brought to recover from defendant \$6,255, which was the difference between \$34,680, the contract price, and \$28,425, which it would have cost plaintiff to have done and completed the work according to the terms of the contract. Defendant, about to bid for the principal contract for the installation of the filtration plant by the Village of Glencoe, procured plaintiff to prepare and submit an estimate of the cost of installing section E of such plant. On May 18, 19 and 20, 1927, the witness, Pew, who by his testimony unquestionably qualified himself as an expert in the installation of filtration systems, along with plaintiff's estimator, now deceased, who worked under Pew's direct supervision, prepared detailed estimate or cost sheets covering sixteen pages and enumerating about four hundred items necessary to the installation of said section E. After checking the items prepared and entered by the estimator as to their fairness and correctness, Pew prepared exhibit D on the morning of May 23, 1927, showing plaintiff's profit on the job in addition to the total cost of the elements necessary for the completion of the work. That same afternoon, the defendant accepted plaintiff's figures, entered into the subcontract with plaintiff and used its figures as the basis of its successful bid for the principal contract. As already shown the defendant repudiated its contract with plaintiff within a few days after it was made. Now defendant claims that the damages that plaintiff endeavored to prove by the witness Pew and plaintiff's

... and their costs on exhibit B that "I will say that I can't give them from memory nor can I study them and remember them, but I can read them off." The witness was not permitted to read from the exhibit the balance of the entries thereon.

Plaintiff then offered in evidence exhibits A and B. Defendant's objection to the introduction of same was sustained. As heretofore stated this action was brought to recover from defendant \$6,325, which was the difference between \$4,800, the contract price, and \$8,425, which it would have cost plaintiff to have done and completed the work according to the terms of the contract. Defendant, about to bid for the principal contract for the installation of the filtration plant by the Village of Clarence, procured plaintiff to prepare and submit an estimate of the cost of installing section B of such plant. On May 12, 1927, the witness, Few, who by his testimony unquestionably qualified himself as an expert in the installation of filtration systems, along with Plaintiff's estimator, now deceased, who worked under Few's direct supervision, prepared detailed estimate on cost sheets covering sixteen pages and enumerating about four hundred items necessary to the installation of said section B. After checking the items reported and entered by the estimator as to their fairness and correctness, Few prepared exhibit B on the morning of May 23, 1927, showing plaintiff's profit on the job in addition to the total cost of the elements necessary for the completion of the work. That same afternoon, the defendant accepted plaintiff's figures, entered into his subcontract with plaintiff and used the figures as the basis for its successful bid for the principal contract. It is already shown that defendant repudiated its contract with plaintiff within a few days after it was made. Now defendant claims that the damages

that plaintiff endeavored to prove by the witness Few and plaintiff's

exhibits D and E were purely speculative; that plaintiff failed to prove what it would cost it to perform the contract; that plaintiff failed to prove that it sustained any actual damage; that the evidence before the court warranted the assessment of only nominal damages; that the court properly refused to admit plaintiff's exhibits D and E in evidence; and that no ruling of the court was requested by plaintiff to permit its witness Pew to read from exhibits D and E.

In the leading case of Masterton v. Mayor of Brooklyn, 7 Hill 61, where the plaintiffs therein undertook and partially performed their contract with defendants to furnish labor and material for the erection of the Brooklyn city hall and the defendants indefinitely suspended the work, the court said at pp. 73, 74 and 75:

"The main question in the case arises out of the claim of the plaintiffs in respect to that portion of their contract with the defendants which remained wholly unexecuted in July, 1837. I think the plaintiffs are entitled to recover the amount they would have realized as profits, had they been allowed fully to execute their contract. The defendants are not to gain by their wrongful act, nor is that to deprive the plaintiffs of the advantages they had secured by the contract, and which would have resulted to them from its performance. The jury must therefore ascertain what it would probably have cost them to complete the contract, over and above the materials on hand; including the value of the marble required, the labor of quarrying and preparing it for use, the expense of transportation, superintendence, and insurance against all hazards, together with every other expense incident to the fulfillment of the undertaking. The aggregate of these expenditures is to be deducted from the amount which would be payable for the performance of this part of the contract, according to the prices therein stipulated, and the balance will be the damages which the jury should allow for the item under consideration.

"Remote and contingent damages, depending on the result of successive schemes or investments, are never allowed for the violation of any contract. But profits to be earned and made by the faithful execution of a fair contract are not of this description. A right to damages equivalent to such profits results directly and immediately from the act of the party who prevents the contract from being performed.

* * *

"The party who is ready to perform is entitled to a full indemnity for the loss of his contract. He should not be made to suffer by the delinquency of the other party, but ought to recover precisely what he would have made by performance. This is as sound in morals as it is in law." (Cited with approval in Kingman v.

exhibits D and E were purely speculative; that plaintiff failed to prove what it would cost it to perform the contract; that plaintiff failed to prove that it sustained any actual damage; that the evidence before the court warranted the assessment of only nominal damages; that the court properly refused to award plaintiff's exhibited and E in evidence; and that no ruling of the court was requested by plaintiff to permit its witness B to read from exhibits D and E.

In the leading case of Wheeler v. Mayor of Brooklyn, 7 Hill 61, where the plaintiff therein undertook and partially performed their contract with defendants to furnish labor and material for the erection of the Brooklyn city hall and the defendants in- definitely suspended the work, the court said at pp. 73, 74 and 75:

"The main question in the case arises out of the claim of the plaintiff in respect to that portion of their contract with the defendants which remained wholly unexecuted in July, 1837. I think the plaintiff is entitled to recover the amount they would have realized as profits, had they been allowed fully to execute their contract. The defendants are not to gain by their wrongful act, nor is that to deprive the plaintiff of the advantage they had secured by the contract, and which would have resulted from its performance. The jury must therefore ascertain what it would probably have cost them to complete the contract, over and above the materials on hand; including the value of the marble required, the labor of quarrying and preparing it for use, the expense of transportation, superintendence, and insurance against all hazards, together with every other expense incident to the fulfilment of the undertaking. The aggregate of these expenditures is to be deducted from the amount which would be payable for the performance of this part of the contract, according to the prices therein stipulated, and the balance will be the damages which the jury should allow for the item under consideration.

"Remote and contingent damages, depending on the result of successive schemes or investment, are never allowed for the violation of any contract. But profits to be earned and made by the faithful execution of a fair contract are not of this description. A right to damages equivalent to such profits results directly and immediately from the act of the party who prevents the contract from being performed.

"The party who is ready to perform is entitled to a full indemnity for the loss of his contract. He should not be made to suffer by the delinquency of the other party, but ought to recover precisely what he would have made by performance. This is as sound in morals as it is in law." (Cited with approval in Wheeler v.

Hanna Wagon Company, 176 Ill. 545; L. S. & M. S. Ry. Co. v. Richards, 152 Ill. 59.)

It will be noted that the rule enunciated in the Masterton case is that the amount recoverable as damages in this character of case is the difference between "what it would probably have cost them to complete the contract" and the amount payable under the contract. In our opinion the rule is the same whether the contract is partially performed or whether it has been repudiated by one party before the other party has had an opportunity to perform.

In Guerini Stone Co. v. P. J. Carlin Construction Co., 240 U. S. 264, where a subcontractor was suing for breach of a contract, under which he was to furnish and construct the concrete work of a post office and court building at San Juan, Porto Rico, the court said at p. 280:

"There was testimony as to the profits that plaintiff probably would have gained if the contract had been proceeded with in the ordinary manner. But this question was excluded from the consideration of the jury upon the ground that the profits were contingent and speculative. In this there was error. The testimony was from an experienced witness, and included an estimate of the total cost to plaintiff of the doing of the work called for in the subcontract. This amounted to \$53,012. The contract price was \$64,750. The witness testified that a profit of \$9,700 would have been made. Whether he intended to say \$11,700 was for the jury to determine. No more definite or certain method of estimating the profits could well be adopted, than to deduct from the contract price the probable cost of furnishing the materials and doing the work. Phila., Wil. & Balti. R. R. v. Howard, 13 How. 307, 344; Hinckley v. Pittsburgh Steel Co., 121 U. S. 264, 275; Anvil Mining Co. v. Humble, 153 U. S. 540, 549."

That the law does not demand proof of damages to an absolute certainty, but is satisfied with proof of the approximate loss in cases of this kind, is held in Barnett v. Caldwell Furniture Co., 277 Ill. 286, where the court said at p. 289:

"It is perhaps true that absolute certainty as to the amount of loss or damage in such cases is unattainable, but that is not required to justify a recovery. All the law requires is that it be approximated by competent proof. That proof of the exact amount of loss is impossible will not justify refusing

It will be noted that the rule announced in the last case is that the amount recoverable is changed in this character of case is the difference between what it would probably have cost them to complete the contract and the amount payable under the contract. In our opinion the rule in the case whether the contract is partially performed or whether it has been completed by one party before the other party has had an opportunity to perform.

U. S. 284, where a subpoena for production of a contract, under which he was to furnish and construct the concrete work of a post office and court building at San Juan, Porto Rico, the court is of p. 280:

"There was testimony as to the profits first plaintiff probably would have gained if the contract had been procured with in the ordinary manner. But this question was examined from the consideration of the jury upon the ground that the profits were contingent and speculative. In this there was error. The testimony was from an expert used witness, and included an estimate of the total cost to plaintiff of the doing of the work called for in the subcontract. This amounted to \$83,012. The contract price was \$4,760. The witness testified that a profit of 10% would have been made. Whether he intended to say 11% was for the jury to determine. A more definite or certain method of estimating the profits could well be adopted than to deduct from the contract price the probable cost of performing the material and doing the work. This is all set out in the opinion of the court in the case of Hinkley v. Pittsburgh Steel Co., 181 Pa. 364, 373; Wall Mining Co. v. Mumple, 188 U. S. 840, 841."

cases of this kind, as held in B. West v. G. Russell, 1911, 101 F. 2d 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 91

277 Ill. 286, where the court said at p. 286:

"It is perhaps true that absolute certainty as to the amount of loss or damage in such cases is unattainable, but that is not required to justify recovery. All that is needed is that it be approximated by competent proof. The goal of the exact amount of loss is inconceivable if not entirely irrelevant."

compensation. If that were the law, contracts of the kind here involved could be violated with impunity. All the law requires in cases of this character is that the evidence shall with a fair degree of probability tend to establish a basis for the assessment of damages. Landis v. Wolf, 206 Ill. 392; Illinois Central Railroad Co. v. Byrne, 205 id. 9; Chapman v. Kirby, 49 id. 211; Wakeman v. Wheeler & Wilson Manf. Co., 101 N. Y. 205; Hess v. Citron, 76 N. Y. Supp. 994; Cross v. Florsheim, 92 id. 832; Aetna Life Ins. Co. v. Nexsen, 84 Ind. 347; City of Terre Haute v. Hudnut, 112 id. 542; Spencer Medicine Co. v. Hall, 78 Ark. 336; Emerson v. Pacific Coast and Norway Packing Co., 96 Minn. 1."

It thus clearly appears that plaintiff was entitled to recover substantial damages by reason of defendant's repudiation of the subcontract if its loss and damage were established by competent evidence and that the testimony of an experienced witness as to an estimate of the total cost to plaintiff of doing the work called for in the subcontract is competent evidence.

This case was tried nearly nine years after the contract was made and breached. Pew, by refreshing his recollection from an examination of exhibit D prepared by himself on the morning of the day the contract was entered into, did establish the total cost of the work to be performed by plaintiff and the profit it would have made if permitted to perform and complete the work under the contract. Plaintiff then sought to show how the total estimates as shown in exhibit D were arrived at. Pew testified that they represented the aggregate of the detailed items and their costs, which were contained in exhibit E, where they had been reduced to writing by himself and plaintiff's estimator in the regular course of plaintiff's business in contemplation of their use as a basis for the contract with defendant and defendant's bid for the principal contract; that all the detailed items entered by plaintiff's estimator in exhibit E were checked by Pew as to their accuracy and that the amounts set opposite every item in exhibit E represented its cost at the time it was entered. Pew fairly stated to the court that he had no independent recollection of the hundreds of entries on exhibit E and that it was impossible for him, even after attempting to refresh his recollection by an

examination of that exhibit, to testify as to such items from memory, but that he knew that when exhibit E was prepared and reduced to writing the items entered thereon were true and correct. We think that under the circumstances as shown the trial court improperly restricted Pew's testimony when it refused to permit him to read the items contained in exhibit E.

In Diamond Glue Co. v. Wietzychowski, 277 Ill. 338, in discussing this question, the court said at pp. 346-47:

"Without attempting to state comprehensive rules applicable to all cases in which writings may be used to assist the memory of a witness, it may be said that a writing can properly be used for the purpose of refreshing the memory of a witness if he is able, after inspecting the writing, to testify to the facts from present recollection. * * * Another condition under which a writing may be used is where the witness, after inspecting a writing, still has no independent recollection of the facts stated therein, but is able to state that he correctly reduced them to writing at the time of the occurrence or within such a time afterward that he had a perfect recollection of them. If the witness knows that the facts were recorded at the time or when they were fresh in his memory, and that the memorandum would not have been made unless he knew the facts therein stated to be true when it was made, he will be permitted to make use of it, provided the writing is produced with an opportunity for cross-examination as to it, so that the jury may also draw their conclusion as to the facts."

In Richardson Fueling Co. v. Seymour, 235 Ill. 319, in an action of assumpsit to recover for coal sold and delivered to a ship, the trial court was sustained in allowing a tug boat captain to read from a book of entries showing dates and amounts of deliveries, after testifying that the entries were made at the time of the deliveries and that he knew them to be true.

We have considered the other points urged but in the view we take of this cause we deem it unnecessary to discuss them.

In view of the fact that the trial court, after denying defendant's motion for a finding in its favor at the close of plaintiff's case, suggested and intimated to counsel for defendant that, if he presented a motion to find the issues in plaintiff's favor with an assessment of merely nominal damages against defendant, it would be sustained, it would be extremely unfair

examination of that exhibit, to testify as to such item from memory, but that he knew that when exhibit H was prepared and reduced to writing the items entered thereon were true and correct. We think that under the circumstances as shown the trial court improperly restricted New's testimony when it refused to permit him to read the items contained in exhibit H.

In Diamond Glass Co. v. Wietachowski, 277 Ill. 325, in

discussing this question, the court said at pp. 346-47:

"Without attempting to state comprehensive rules applicable to all cases in which writings may be used to assist the memory of a witness, it may be said that a writing can properly be used for the purpose of refreshing the memory of a witness if he is able, after inspecting the writing, to testify to the facts from present recollection. * * * Another condition under which a writing may be used is where the witness, after inspecting a writing, still has no independent recollection of the facts stated therein, but is able to state that he correctly reduced them to writing at the time of the occurrence or within such a time afterward that he had a perfect recollection of them. If the witness knows that the facts were recorded at the time or when they were fresh in his memory, and that the memorandum would not have been made unless he knew the facts therein stated to be true when it was made, he will be permitted to make use of it, provided the writing is produced with an opportunity for cross-examination as to it, so that the jury may also draw their conclusion as to the facts."

In Richardson Whiting Co. v. Symons, 235 Ill. 319, in an

action of assumpsit to recover for coal sold and delivered to a ship, the trial court was sustained in allowing a tug boat captain to read from a book of entries showing dates and amounts of deliveries, after testifying that the entries were made at the time of the deliveries and that he knew them to be true.

We have considered the other points urged but in the view we take of this cause we deem it unnecessary to discuss them.

In view of the fact that the trial court, after denying

defendant's motion for a finding in its favor at the close of plaintiff's case, suggested and invited to counsel for defendant that, if he presented a motion to find the issues in plaintiff's favor with an assessment of merely nominal damages against defendant, it would be sustained, it would be extremely unfair

under the circumstances to preclude defendant from making such defense as it might have to plaintiff's claim. We think the ends of justice will be best served by a retrial of the case in its entirety.

The judgment of the circuit court is therefore reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

Friend and Scanlan, JJ., concur.

under the circumstances to preside defendant from making such
defense as it might have to plaintiff's claim. We think the
ends of justice will be best served by a retrial of the case
in its entirety.

The judgment of the circuit court is therefore reversed
and the cause remanded for a new trial.

REVEREND AND HONORABLE.

Trind and Sealman, J., concur.

38919

P. ECONOMAKOS, for the use of
AMALGAMATED TRUST & SAVINGS
BANK, a corporation,

Appellant,

v.

THE LIVE STOCK NATIONAL BANK OF
CHICAGO, a corporation, garnishee
defendant, and HALSTED PACKING HOUSE,
Inc., a corporation, intervening
petitioners,

Appellees.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

287 I.A. 628⁴

MR. PRESIDING JUSTICE SULLIVAN
DELIVERED THE OPINION OF THE COURT.

This appeal seeks to reverse a judgment of the municipal court entered January 29, 1936, against the beneficial plaintiff, Amalgamated Trust & Savings Bank, and in favor of Halsted Packing House, Inc., the adverse claimant, in an action of garnishment based upon a judgment for \$151.86, obtained by the Amalgamated Trust & Savings Bank against Peter Economakos.

The Live Stock National Bank of Chicago was named garnishee in the garnishment proceedings and the statement of claim filed therein December 31, 1935, alleged that October 19, 1932, the Amalgamated Trust & Savings Bank recovered a judgment in the municipal court for \$151.68 against Peter Economakos; that execution was issued thereon October 20, 1930, which was returned by the bailiff "no property found" on the same date; that defendant had no property in his possession liable to execution; that plaintiff had just reason to believe that the garnishee defendant, Live Stock National Bank of Chicago, was indebted to and had in its possession "effects or estate" of said defendant; and that

P. ECONOMAKOS, for the use of
AMALGAMATED TRUST & SAVINGS
BANK, a corporation,
Appellant,

v.

THE LIVE STOCK NATIONAL BANK OF
CHICAGO, a corporation, garnishee
defendant, and HAROLD PACKING HOUSE,
Inc., a corporation, intervening
petitioners,
Appellees.

MR. PRESIDING JUSTICE CULLIVAN
DELIVERED THE OPINION OF THE COURT.

This appeal seeks to reverse a judgment of the municipal
court entered January 29, 1936, against the beneficial Plaintiff,
Amalgamated Trust & Savings Bank, and in favor of Harold Packing
House, Inc., the adverse claimant, in an action of garnishment
based upon a judgment for \$151.68, obtained by the Amalgamated
Trust & Savings Bank against Peter Economakos.

The Live Stock National Bank of Chicago was named gar-
nisher in the garnishment proceedings and the statement of claim
filed therein December 21, 1935, alleged that October 19, 1935,
the Amalgamated Trust & Savings Bank recovered a judgment in the
municipal court for \$151.68 against Peter Economakos; that execu-
tion was issued thereon October 30, 1935, which was returned
by the bailiff "no property found" on the same date; that defend-
ant had no property in his possession liable to execution; that
Plaintiff had just reason to believe that the garnishee defendant,
Live Stock National Bank of Chicago, was indebted to and had in
its possession "effects or estate" of said defendant; and that

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

287 I.A. 628

there was due from defendant to plaintiff \$151.86 with interest thereon from October 19, 1932, which with costs amounted to \$187.73.

The garnishee's answer to plaintiff's interrogatories, filed January 4, 1936, averred "that at the time of service of the writ of garnishment and at the time of answer in this cause, the said garnishee, Live Stock National Bank of Chicago, a corporation, had in its possession \$187.73, deposited in said bank in the name of Mid-City Packing House, which company, the garnishee believes is solely owned by Peter Economakos, principal defendant herein."

January 8, 1936, the Halsted Packing House, as an adverse claimant, filed its intervening petition, which is as follows:

"Your Petitioner JAMES PANAGAKIS respectfully represents that he is the President and duly authorized agent of the HALSTED PACKING HOUSE, INC. an Illinois corporation; that said corporation is organized and existing under and by virtue of the laws of the State of Illinois, and that the said corporation operates the premises located at 736 South Halsted Street, Chicago, Illinois; and doing business under the name of MID CITY PACKING HOUSE.

"Your Petitioner further represents that the MID CITY PACKING HOUSE is owned and operated by the HALSTED PACKING HOUSE, INC.

"Your-Petitioner further represents that the HALSTED PACKING HOUSE, INC. had a bank account at the LIVE STOCK NATIONAL BANK OF CHICAGO under the name of MID CITY PACKING HOUSE and that the funds in said bank are owned and belonged to the aforesaid corporation.

"Your Petitioner further states that on the 31st day of December, A. D. 1935, a garnishment was issued against the funds of the said corporation, said garnishment being predicated on a judgment rendered against one PETER ECONOMAKOS as an individual herein and that the said plaintiff has garnished the funds of the corporation.

"Your Petitioner further states that the said PETER ECONOMAKOS is employed by the HALSTED PACKING HOUSE, INC. and the subsidiary company MID CITY PACKING HOUSE, merely as an employee and manager, with the authority to sign checks on behalf of the company.

"Your Petitioner further alleges that checks are withdrawn from the said MID CITY PACKING HOUSE either by PETER ECONOMAKOS as manager or JAMES PANAGAKIS as President.

there was one from defendant to plaintiff, \$151.86 with interest thereon from October 19, 1932, which with costs amounted to \$187.73.

The garnishee's answer to plaintiff's interrogatories, filed January 4, 1936, averred that at the time of service of the writ of garnishment and at the time of answer in this cause, the said garnishee, Live Stock National Bank of Chicago, a corporation, had in its possession \$187.73, deposited in said bank in the name of Mid-City Packing House, which company, the garnishee believes is solely owned by Peter Mochnoskos, principal defendant herein."

January 8, 1936, the Halted Packing House, as an intervenor,

plaintiff, filed its intervening petition, which is as follows:

"Your Petitioner JAMES PANAGAKIS respectfully represents that he is the President and duly authorized agent of the HALTED PACKING HOUSE, INC., an Illinois corporation; that said corporation is organized and existing under and by virtue of the laws of the State of Illinois, and that the said corporation operates the premises located at 736 South Halsted Street, Chicago, Illinois; and doing business under the name of MID CITY PACKING HOUSE."

"Your Petitioner further represents that the MID CITY PACKING HOUSE is owned and operated by the HALTED PACKING HOUSE, INC."

"Your Petitioner further represents that the HALTED PACKING HOUSE, INC. had a bank account at the LIVE STOCK NATIONAL BANK OF CHICAGO under the name of MID CITY PACKING HOUSE and that the funds in said bank are owned and belonged to the Halted corporation."

"Your Petitioner further states that on the 1st day of December, A. D. 1935, a garnishment was issued against the funds of the said corporation, said garnishment being predicated on a judgment rendered against one PETER MOCHNOSKOS as an individual herein and that the said plaintiff has furnished the funds of the corporation."

"Your Petitioner further states that the said PETER MOCHNOSKOS is employed by the HALTED PACKING HOUSE, INC. and the subsidiary company MID CITY PACKING HOUSE, merely as an employee and manager, with the authority to sign checks on behalf of the company."

"Your Petitioner further alleges that checks were drawn from the said MID CITY PACKING HOUSE either by PETER MOCHNOSKOS as manager or JAMES PANAGAKIS as president."

"Your Petitioner further states that the said PETER ECONOMAKOS has no interest or ownership in any of the funds now garnished at the LIVE STOCK NATIONAL BANK OF CHICAGO and that the said funds belong to the HALSTED PACKING HOUSE, INC., and its subsidiary the MID CITY PACKING HOUSE.

"WHEREFORE your Petitioner prays that the said garnishment be dismissed and that the funds now held by reason of the aforesaid garnishment writ be released and for such other and further relief in the premises as the Court sees fit."

After hearing, the trial court found the issues against plaintiff and ordered the garnishee discharged.

The only question presented for our determination is whether the finding of the court was manifestly against the weight of the evidence.

We deem it unnecessary to discuss the evidence in detail. The testimony of James Panagakis, president, director and stockholder of the intervening petitioner was meagrely abstracted, but we have examined all the testimony of the witnesses and the documentary evidence in the record, and find that while there is some conflict in the evidence it is sufficient to sustain the allegations of the intervening petition.

A finding of a trial court on controverted facts in a trial without a jury is entitled to the same weight on appeal as the verdict of a jury. The trial judge saw and heard the witnesses and had advantages which we do not possess in judging of the weight which should be given to the testimony where there is a conflict. Under the law and established rules of practice the conclusions of the trial judge should not be disturbed unless it clearly appears from the record that such conclusions are wrong. (City of Quincy v. Kemper, 304 Ill. 303; Kuehne v. Malach, 286 id. 120; Podolski v. Stone, 186 id. 540; Wood v. Price, 46 id. 435.)

After careful consideration of the evidence in this

"Your Petitioner further states that the said T. J. BROWNE has no interest or ownership in any of the funds now garnished at the LIVE STOCK NATIONAL BANK OF CHICAGO and that the said funds belong to the HILLTOP PACKING HOUSE, INC., and its subsidiary the MID CITY PACKING HOUSE.

"WHEREFORE Your Petitioner prays that the said garnishment be dismissed and that the funds now held by reason of the aforesaid garnishment writ be released and for such other and further relief in the premises as the Court sees fit."

After hearing, the trial court found the issues against plaintiff and ordered the garnishment discharged.

The only question presented for our determination is whether the finding of the court was manifestly against the weight of the evidence.

We deem it unnecessary to discuss the evidence in detail. The testimony of James Panagiotis, president, director and stockholder of the intervening petitioner was merely rebutted, but we have examined all the testimony of the witnesses and the documentary evidence in the record, and find that while there is some conflict in the evidence it is sufficient to sustain the allegations of the intervening petition.

A finding of a trial court on controverted facts in a trial without a jury is entitled to the same weight on appeal as the verdict of a jury. The trial judge saw and heard the witnesses and had advantages which we do not possess in judging of the weight which should be given to the testimony where there is a conflict. Under the law and established rules of practice the conclusions of the trial judge should not be disturbed unless it clearly appears from the record that such conclusions are

Wrong. (City of Chicago v. Kennedy, 306 Ill. 503; In re v. Jackson, 308 Ill. 120; Pohlman v. Stone, 186 Ill. 540; Bond v. Stone, 46

After careful consideration of the evidence in this

cause we are not prepared to hold that the conclusions reached by the trial judge are wrong or that the finding of the trial court is manifestly against the weight of the evidence.

The judgment of the municipal court is affirmed.

AFFIRMED.

Friend and Scanlan, JJ., concur.

because we are not prepared to hold that the conclusions reached
by the trial judge are wrong or that the finding of the trial
court is manifestly against the weight of the evidence.
The judgment of the municipal court is affirmed.

ATTORNEY,

Friend and Son, 11, corner

In re Petition of
KATIE HOLUB,
Appellee,

vs.

MICHAEL PAITL and
JOSEPHINE PAITL,
Appellants.

Appeal from

County Court

Cook County.

287 I.A. 629¹

MR. PRESIDING JUSTICE SULLIVAN
DELIVERED THE OPINION OF THE COURT.

Michael Paitl and Josephine Paitl, his wife, filed a bill of complaint in the Circuit court October 22, 1930, charging Katie Holub and others with fraudulently inducing the said Paitls to execute a bill of sale conveying a tea and coffee store owned by them to one Anton Mainz, and a decree was entered in that proceeding in which it was ordered "that a judgment be and the same is hereby entered herein for and on behalf of said complainants and each of them and against said defendant, Katie Holub, for a total sum of principal and interest amounting to \$6,261.10."

Pursuant to such decree, the Paitls (hereinafter for convenience referred to as the plaintiffs) caused to be issued by the clerk of the Circuit court a capias ad satisfaciendum, under which Katie Holub was taken into custody by the sheriff of Cook County. February 8, 1935, she filed a petition in the County court under the Insolvent Debtors Act for her release from such custody. Upon the hearing on her petition she introduced in evidence the original bill of complaint filed by the plaintiffs in the Circuit court proceeding and the amendment thereto, as well as the decree entered therein, and she testified as to the correctness of the schedule filed by her, specifying her assets and liabilities. On May 10, 1935, the County court found "that malice is not the gist of the action" in the Circuit court proceeding and entered judgment ordering that the petitioner, Katie Holub, be discharged from the custody of the sheriff. This appeal seeks to reverse the judgment of the County court. Katie Holub, petitioner in the County court and the appellee here, filed no brief.

82

Special from

County Court

Cook County.

287 I.A. 629

Appellants.
MICHAEL PATTI and
JOSEPHINE PATTI,
vs.
KATIE HOLUB,
Appellee.

MR. PRESIDING JUSTICE HOLLIVAN
DELIVERED THE OPINION OF THE COURT.

Michael Patti and Josephine Patti, his wife, filed a bill of complaint in the Circuit Court October 2, 1935, charging Katie Holub and others with fraudulently inducing the said Patti to execute a bill of sale conveying a tea and coffee store owned by them to one Newton Mainz, and a decree was entered in that proceeding in which it was ordered "that a judgment be and the same is hereby entered herein for and on behalf of said complainants and each of them and against said defendant, Katie Holub, for a total sum of principal and interest amounting to \$6,461.10."

Pursuant to such decree, the Patti (Plaintiff) were referred to as the Plaintiff) caused to be issued by the Clerk of the Circuit Court a capias ad satisfaciendum, under which Katie Holub was taken into custody by the Sheriff of Cook County. February 1936, she filed a petition in the County Court under the Insolvent Debtors Act for her release from such custody. Upon the hearing on her petition she introduced in evidence the original bill of complaint filed by the Plaintiff in the Circuit Court proceeding and two amendments thereto, as well as the decree entered therein, and she testified as to the correctness of the schedule filed by her, specifying her assets and liabilities. On May 10, 1936, the County Court found "that notice is not the gist of the action" in the Circuit Court proceeding and entered judgment ordering that the petitioner, Katie Holub, be discharged from the custody of the Sheriff. This appeal seeks to reverse the judgment of the County Court. Katie Holub, petitioner in the County Court and the

Plaintiffs' bill of complaint in the Circuit court action alleges substantially that they were on October 1, 1923, and for several years prior thereto, the owners of a tea and coffee store, together with merchandise and fixtures contained therein, located at 4017 W. 26th street, Chicago, Illinois; that they became interested in the purchase of a bungalow at 5337 South Normandy avenue, Chicago, Illinois; that they were introduced to one Anton Mainz, who was represented to be the owner in fee of said premises; that negotiations for the sale thereof the the Paitls were carried on by Katie Holub, sister of Mainz, and her son, Anthony S. Holub, an attorney at law; that the parties met October 1, 1923, and a contract drawn by Attorney Anton S. Holub was executed by Mainz and the Paitls for the sale of said bungalow to the latter for \$9,500.

The bill of complaint further alleges that this contract, which was attached to said bill and made a part thereof, provided that plaintiffs were to assume the existing mortgage of \$3,500 on said property, to deliver immediately the title to and the possession of their tea and coffee store to Mainz at an agreed "consideration of \$4,000," to execute and deliver a second mortgage for \$1,000 on the property purchased and to pay \$1,000 cash upon the consummation of the sale; that a bill of sale conveying the tea and coffee store be given Mainz "as additional deposit as earnest money" upon the purchase price of the property; that Mainz was to convey to the purchasers a good and merchantable title to said real estate "by statutory general warranty deed" with release of dower and homestead rights and subject to no existing leases and furnish them with a certificate of title, a merchantable abstract of title or a merchantable title guarantee policy made by the Chicago Title & Trust Company; and that "in case material defects be found in said title and so reported, then, if said defects be not cured within sixty days after such notice thereof, this contract shall at the purchaser's option become absolutely null and void and said earnest money shall be returned."

Plaintiffs' bill of complaint in the Illinois court action alleges substantially that they were on October 1, 1935, and for several years prior thereto, the owners of a tea and coffee store, together with merchandise and fixtures contained therein, located at 4017 W. 28th Street, Chicago, Illinois; that they became interested in the purchase of a bungalow at 5837 South Broadway Avenue, Chicago, Illinois; that they were introduced to one Anton E. Holub, who was represented to be the owner in fee of said premises; that negotiations for the sale thereof of the said bungalow were carried on by Katie Holub, sister of Anton, and son, Anthony E. Holub, an attorney at law; that the parties set October 1, 1935, and a contract drawn by Attorney Anton E. Holub was executed by Main and the parties for the sale of said bungalow to the latter for \$4,000.

The bill of complaint further alleges that this contract, which was attached to said bill and made a part thereof, provided that plaintiffs were to assume the existing mortgage of \$3,500 on said property, to deliver immediately the title to and the possession of their tea and coffee store to Main at an agreed "consideration of \$4,000," to execute and deliver a second mortgage for \$1,000 on the property purchased and to pay \$1,000 each upon the consummation of the sale; that bill of sale conveying the tea and coffee store be given Main "as additional deposit as earnest money" upon the purchase price of the property; that Main was to convey to the purchasers a good and marketable title to said real estate "by statutory general warranty deed" with release of power and homestead rights and subject to no existing leases and furnish them with a certificate of title, a marketable abstract of title or a merchantable title guarantee policy made by the Chicago Title Trust Company; and that "in case material defects be found in said title and so reported, then, if said defect be not cured within sixty days after such notice thereof, this contract shall be void and the option become absolutely null and void and said earnest money shall be returned."

The bill further alleged that at the time said contract was drawn and executed plaintiffs were not represented by counsel and relied entirely upon the fairness and integrity of Katie Holub, her son and other defendants present; that, knowing this to be true, the defendants, including Katie Holub, wrongfully, fraudulently and knowingly induced and caused the Plaints to execute the said real estate contract as prepared and presented to them, containing the provision that they then and there execute a bill of sale conveying their tea and coffee store to Mainz; that the defendants wrongfully and fraudulently procured plaintiffs to execute and deliver to Mainz said bill of sale at that time "as earnest money" as provided in said contract and to deliver the possession of their tea and coffee store to Mainz, since which time they have been deprived of its possession.

The bill also alleges that an opinion of title was thereafter presented to plaintiffs, which disclosed that one Jacob Kisonodi claimed an interest in said real estate adverse to that of Mainz; that they made an immediate demand upon Mainz and his attorney to clear the title to said real estate, but the defect was not cured within the sixty days provided in the contract; and that for more than six months thereafter repeated demands were made to cure said defect, but the defendants failed, neglected and refused to do so.

The bill then alleges that, immediately after the execution of the real estate contract and the receipt by them of plaintiffs' bill of sale of their tea and coffee shop on October 1, 1923, Mainz and Katie Holub took possession of said store and caused it to be transferred and sold to an innocent third person, who paid value therefor, and that the store has since been sold to various persons so that it cannot be easily identified nor taken possession of without damage to innocent third persons who have dealt with the property; that said store was sold by Katie Holub and Mainz with the assistance of Anthony S. Holub long before plaintiffs ascertained that Mainz could not deliver a good and merchantable title to the real estate involved in the aforesaid contract;

The bill further alleged that at the time said contract was drawn and executed plaintiffs were not represented by counsel and lied entirely upon the fairness and integrity of Katie Holup, her son and other defendants present; that, knowing this to be true, the defendants, including Katie Holup, wrongfully, fraudulently and knowingly induced and caused the latter to execute the said real estate contract as prepared and presented to them, containing the provision that they then and there execute a bill of sale conveying their fee and interest to him; that the defendants wrongfully and fraudulently procured plaintiffs to execute and deliver to him said bill of sale at the time "as earnest money" as provided in said contract and to deliver possession of their fee and coffee store to him, since which time they have been deprived of its possession.

The bill also alleges that an opinion of title was thereafter presented to plaintiffs, which disclosed that one Jacob Holup claimed an interest in said real estate adverse to that of him; that they made an immediate and upon him and his attorney to clear title to said real estate, but the defect was not cured within the sixty days provided in the contract; and that for more than six months thereafter repeated demands were made to cure said defect, but the defendants failed, neglected and refused to do so.

The bill then alleges that, immediately after the execution of the real estate contract and the receipt by them of plaintiffs' bill of sale of their fee and coffee shop on October 1, 1925, said Katie Holup took possession of said store and caused it to be transferred to an innocent third person, who paid value therefor, and that the store has since been sold to various persons so that it cannot be easily identified nor taken possession of without damage to innocent third persons who have dealt with the property; that said store was sold to Katie Holup and him with the assistance of Anthony M. Holup long before plaintiffs ascertained that him could not deliver a good and marketable title to the real estate involved in the aforesaid contract;

that the proceeds of the sale of the tea and coffee store were received and kept by the defendants, including Katie Holub; that a long time after the contract for the sale of the real estate in question was made plaintiffs learned that Katie Holub owned an undivided half interest in such real estate; that the said premises have since been conveyed to other persons; and that plaintiffs had made repeated demands upon defendants to pay them \$4,000, the agreed value of said tea and coffee store, which demands have been refused and ignored.

The bill prayed, among other things, that complete answers be filed by the defendants disclosing their dealings with plaintiffs, their respective interests in said real estate, the disposition they made of the tea and coffee store, who shared in the proceeds of the sale thereof, why plaintiffs were procured to execute a bill of sale to said store and to deliver to Mainz immediate possession thereof, whether they knew of the claimed interest of Kisosondi in said real estate and what interest he actually had therein and why they could not deliver to plaintiffs a good and merchantable title thereto; that the court find that the bill of sale to the tea and coffee store and the delivery of the possession of said store had been fraudulently procured, and order said sale set aside; that the defendants and each of them be decreed to pay plaintiffs \$4,000, the agreed value of their tea and coffee store, with interest to the date of the entry of the decree; and that "upon their failure to pay said sums so decreed" the court order to be issued a capias ad satisfaciendum "for the complete enforcement of the decree."

The amendment to the bill of complaint in the Circuit court action alleges in substance that at the time of the signing of the real estate contract the Normandy avenue property had already been incumbered with a junior mortgage trust deed, recorded July 1, 1923, securing a note for \$1,750, dated July 25, 1923; that this second mortgage was an additional cloud upon defendant's title, to which plaintiffs objected immediately upon receiving notice thereof, but, notwithstanding their objection, defendants neglected and refused to

that the proceeds of the sale of the tea and coffee store were received and kept by the defendants, including Katie Holm; that a long time after the contract for the sale of the real estate in question was made Plaintiff learned that Katie Holm owned an undivided half interest in such real estate; that the said parties have since been conveyed to other persons; and that Plaintiff had made repeated demands upon defendants to pay him \$4,000, the supposed value of said tea and coffee store, which demands have been refused and ignored.

The bill prayed, among other things, that complete recovery be filed by the defendants disclosing their dealings with Plaintiff, their respective interests in said real estate, the disposition they made of the tea and coffee store, who shared in the proceeds of the sale thereof, why Plaintiff were refused to execute a bill of sale to said store and to deliver to him immediate possession thereof, whether they knew of the claimed interest of Plaintiff in said real estate and what interest he actually had therein and why they could not deliver to Plaintiff a good and merchantable title thereof; that the court find that the bill of sale to the tea and coffee store and the delivery of the possession of said store had been fraudulently procured, and order said sale set aside; that the defendants and each of them be decreed to pay Plaintiff \$4,000, the agreed value of their tea and coffee store, with interest to the date of the entry of the decree; and that "upon their failure to pay said sum as decreed" the court order to be issued a capias ad satisfaciendum "for the complete enforcement of the decree."

The amendment to the bill of complaint in the Circuit Court action alleges in substance that at the time of the signing of the real estate contract the normally average property had already been encumbered with a junior mortgage first deed, recorded July 1, 1902, securing a note for \$1,750, dated July 22, 1902; that this second mortgage was an additional claim upon defendant's title, to which Plaintiff objected immediately upon receiving notice thereof, but

cure this defect so that a good and merchantable title could be delivered to plaintiffs within sixty days as provided in the aforesaid contract.

The decree of the Circuit court found and ordered inter

alia:

"That on, to-wit, October 1, 1923, the complainants entered into a written contract for the purchase of a bungalow at 5337 South Normandy Avenue, Chicago, Illinois, for the agreed price of \$9500.00; that the contract was executed by complainants as purchasers and one ANTON MAINZ as purported owner and seller thereof; that negotiations for the sale of said real estate were carried on by the defendant KATE HOLUB, a sister of said ANTON MAINZ; that said KATE HOLUB was an owner of said real estate together with said ANTON MAINZ, which fact was unknown and was undisclosed to the complainants herein.

"That at the time the parties entered into said contract, the said defendant KATE HOLUB, then and there wrongfully, wilfully, knowingly, and fraudulently induced the complainants herein to execute a bill of sale, selling and conveying to said ANTON MAINZ a Tea and Coffee Store, then owned by said complainants, located at 4017 West 26th Street, Chicago, Illinois, of the agreed value of \$4000.00, as earnest money for the consummation of said real estate purchase contract, and to immediately deliver title to and possession of, said Tea and Coffee Store to said ANTON MAINZ, on behalf of said defendant KATE HOLUB, and that said KATE HOLUB immediately thereafter took possession and exercised absolute dominion and control over said Tea and Coffee Store, as her own property, and that within approximately six weeks thereafter, she sold and transferred the said Tea and Coffee Store to an innocent purchaser and retained the proceeds thereof; that the assets of said Tea and Coffee Store have been fully dissipated and cannot be found or identified. (Italics ours.)

"That the agreed value of said Tea and Coffee Store is \$4000.00 which the complainants are entitled to have returned to them, together with interest thereon from October 1, 1923, at the rate of Five Percent Per Annum, which interest amounts to \$261.10, making a total of \$6261.10, due and owing to the complainants herein, at the date hereof.

"IT IS THEREFORE ORDERED, ADJUDGED AND DECREED, that the contract entered into on October 1, 1923, between ANTON MAINZ as seller and the complainants herein as purchasers of the real estate at 5337 South Normandy Avenue, Chicago, Illinois, be and the same is hereby cancelled and declared null and void and of no further force and effect.

"IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that the sale and delivery of said Tea and Coffee Store by the complainants to said ANTON MAINZ and to said defendant KATE HOLUB, be and the same is hereby vacated, set aside, and held for nought, title and possession thereof having been fraudulently obtained from the complainants herein.

"IT IS FURTHER ORDERED, ADJUDGED and DECREED, that a judgment be and the same is hereby entered herein for and on behalf of said complainants and each of them against said defendant KATE HOLUB, for the total sum of principal and interest amounting to \$6261.10, and that an execution or capias ad satisfaciendum or both may issue against said defendant KATE HOLUB, for said \$6261.10, together with the costs paid out by the complainants herein."

any this defect to that a good and search whole title could be delivered to plaintiffs within sixty days as provided in the agreement.

The decree of the Illinois court found and ordered that:

"That on, to-wit, October 1, 1933, the complainant entered into a written contract for the purchase of a building at 8337 South Broadway Avenue, Chicago, Illinois, for the agreed price of \$3500.00; that the contract was executed by complainant as purchaser and one name as purported owner and seller thereof; that no title was transferred to said real estate with a deed on by the defendant KATE HOLMES, administrator of said KATE HOLMES; that said KATE HOLMES was an owner of said real estate together with said KATE HOLMES, which fact was known and was disclosed to the complainant herein.

"That at the time the parties entered into said contract, the defendant KATE HOLMES, then and there wrongfully, unlawfully, fraudulently and intentionally induced the complainant herein to execute a deed of sale, selling and conveying to said KATE HOLMES, then and there wrongfully, unlawfully, fraudulently and intentionally, located at 8337 South Broadway Avenue, Chicago, Illinois, of the agreed value of \$3500.00, an earnest money for the execution of said real estate purchase contract, and to immediately deliver title to and possession of, said real estate to said KATE HOLMES, on behalf of said defendant KATE HOLMES, and that said KATE HOLMES immediately thereafter took possession and exercised absolute control and control over said real estate store, as her own property, and that within approximately six weeks thereafter, she sold and transferred the said real estate store to an innocent purchaser named KATE HOLMES, the proceeds thereof, less the costs of said sale, and other costs have been fully disposed and cannot be found or identified.

(Statistics over.)

"That the agreed value of said real estate store is \$3500.00 and the complainant is entitled to have returned to her, together with interest thereon from October 1, 1933, at the rate of five percent per annum, which interest amounts to \$201.10, making a total of \$3701.10, and owing to the complainant herein, at the date thereof.

"It is further ordered, adjudged and decreed, that the complainant entered into on October 1, 1933, between KATE HOLMES as seller and the complainant herein as purchaser of the real estate at 8337 South Broadway Avenue, Chicago, Illinois, be and the same is hereby annulled and declared null and void and of no further force and effect.

"It is further ordered, adjudged and decreed, that the sale and delivery of said real estate store by the complainant to said KATE HOLMES and to said defendant KATE HOLMES, be and the same is hereby annulled, set aside, and null and void for non est, title and possession thereof have been fraudulently obtained from the complainant herein.

"It is further ordered, adjudged and decreed, that a judgment be and the same is hereby entered herein for and on behalf of said complainant and each of them against said defendant KATE HOLMES, for the total sum of principal and interest amounting to \$3701.10, and for an execution or copies of certificates of judgment or both may issue against said defendant KATE HOLMES, for said sum of \$3701.10, together with the costs said out of the complainant herein."

It is urged that the allegations of the bill of complaint in the Circuit court proceeding and the finding of the decree of that court that the tea and coffee store of plaintiffs was fraudulently procured from them by Katie Holub established malice as the gist of the action.

In Corwin v. Tillman, 255 Ill. App. 230, where the propriety of the issuance of a capias ad satisfaciendum to enforce a decree in equity was questioned, the court said at p. 238:

"While the action is in form for equitable relief the gravamen and gist of the action is a tort clearly set out in the second amended bill, namely, the perpetration of a malicious fraud. Had complainant brought an ex delicto action of deceit based upon the same state of facts and obtained judgment there would be no question as to the malice being the gist of such action and that a ca. sa. would issue to enforce the judgment. Upon the same facts malice is none the less the gist of the action because relief is sought in equity, and under the principles stated in Whalen v. Billings, supra, resort may be had to the same remedy as at law to enforce the collection of the decree for money. The allegations in the amended bill and the finding in the decree are that defendant falsely and fraudulently made the misrepresentations to complainant therein recited for the purpose and with the intention of deceiving and defrauding him. It cannot be doubted, therefore, that malice was the gist of the action. The test is not the form of the action (Barney v. Chapman, 21 Fed. 903) nor the specific relief asked, but whether the facts upon which the right of action rests imply malice."

In re Paar, 264 Ill. App. 372, the court said at p. 377:

the "While the defendant does not contend in this court that the gist of action, as alleged in each count of the declaration, was not malice except on the theory that the tort was waived by bringing an action of assumpsit, and which contention we have held untenable, yet we are of the opinion that malice is the gist of each count of the declaration. It alleges that fraud and deceit of the defendant in the exchange of the properties, * * *. Malice is the gist of the action of fraud and deceit. Jernberg v. Mix, 199 Ill. 254; Scanlon v. Whalen, 249 Ill. App. 19."

In Lipman v. Goebel, 357 Ill. 315, the court said at p. 325:

"The defendant cannot be permitted to offer evidence in this proceeding that his conduct was not willful and malicious. That issue was submitted to the jury in the tort case, and both counts of the declaration having charged malice as the gist of the action, the judgment of the trial court, later affirmed by the Appellate Court is res judicata upon the issue. *** We hold that malice was the gist of the action in the case at bar."

It is manifest that where equitable relief is sought as here for the perpetration of a malicious fraud, malice is the gist of the action. That is the "gist of the action" which constitutes the basis of the suit and without which the suit could not be maintainable. It is the essential ground or object of the suit, without which there is not a cause

of the action.

Recently procured from them by Katie Holub established malice as the gist of that court that the tea and coffee store of plaintiffs was fraudulent in the Circuit court proceeding and the finding of the decree. It is urged that the allegations of the bill of complaint are

George in equity was questioned, the court said at p. 433: "property of the issuance of a copy as satisfied to enforce a In Gorwin v. Tillman, 255 Ill. App. 330, where the

"While the action is in form for equitable relief the gravamen and gist of the action is a tort clearly set out in the second amended bill, namely, the perpetration of a malicious fraud. Had complainant brought an ex delicto action of deceit based upon the same state of facts and obtained judgment there would be no question as to the malice being the gist of such action and that a q. a. would leave to enforce the judgment. Upon the same facts malice is none the less the gist of the action because relief is sought in equity, and under the principles stated in Wiles v. Billings, supra, resort may be had to the same remedy as at law to enforce the collection of the decree for money. The allegations in the amended bill, recited in the decree are that defendant falsely and fraudulently made the representations to complainant therein recited for the purpose and with the intention of deceiving and defrauding him. It cannot be doubted, therefore, that malice was the gist of the action. The test is not the form of the action (Barney v. Gresham, 21 Fed. 908) nor the relief asked, but whether the facts upon which the right of action vests imply malice."

In re Part, 264 Ill. App. 372, the court said at p. 377:

Terberg v. Mox, 193 Ill. 254; Seaton v. Seaton, 249 Ill. 40. of the properties. * * *. Mox is the list of the action of fraud and list of action that Mox is the list of each count of the declaration except on the theory that the tort was waived by bringing an action of assumpsit, and which contention we have all understood, yet list of action, as alleged in each count of the declaration, is not the "While the defendant does not contend in this court that the

In *William v. Gobel*, 357 Ill. 215, 512 N.E.2d 1111, 1112 (Ill. 1987), the court stated:

"The defendant cannot be permitted to offer evidence in this proceeding that his conduct was not willful and malicious. That is not submitted to the jury in the tort case, and both counts of the action having charged malice as the gist of the action, the judgment of the trial court, later affirmed by the Appellate Court is res judicata. We hold that malice was the gist of the action in the case at bar."

It is manifest that where equitable relief is sought as here for the perpetration of a malicious fraud, malice is the gist of the action. That is the "gist of the action" which constitutes the basis of the suit and without which the suit could not be maintained. It is the

of action. The case alleged in plaintiff's bill of complaint in the Circuit court was one charging malice and not merely for the recovery of money. Malice was, therefore, the gist of the action and the capias ad satisfaciendum was properly issued. (Greener v. Brown, 323 Ill. 221.)

The judgment of the County court is reversed and the cause remanded with directions to remand the petitioner to the custody of the sheriff.

REVERSED AND REMANDED
WITH DIRECTIONS.

Friend and Scanlan, JJ., concur.

of action. The case alleged in plaintiff's bill of complaint in the first
that court was one charging malice and not merely for the recovery of
money. Malice was, therefore, the gist of the action and the earlier
decision in Malice v. Brown was properly issued. (Green v. Brown, 303 Ill. 231.)
The judgment of the County court is reversed and the
cause remanded with directions to award the petitioner the custody
of the sheriff.

REVEREND AND HONORABLE
JUDGES OF THE COURT.

Friend and Counsel, J. J. Conner.

CORA B. SPENCER,
Appellant,

vs.

CITY OF CHICAGO, a
municipal corporation,
Appellee.

84
Appeal from 287 I.A. 629
Superior Court,
Cook County.

MR. PRESIDING JUSTICE SULLIVAN
DELIVERED THE OPINION OF THE COURT.

This is an action brought by plaintiff, Cora B. Spencer, against defendant, City of Chicago, to recover damages for personal injuries alleged to have been sustained by her January 25, 1934, as the result of falling on a defective curb stone and sidewalk in said City of Chicago. On March 3, 1934, forty-six days after the accident, plaintiff served the statutory notice provided under the Injuries Act upon defendant by leaving a copy thereof with William H. Sexton, Alexander M. Smietanka and Peter J. Brady, corporation counsel, city attorney and city clerk, respectively, of said city. Such notice failed to state plaintiff's address. At the close of plaintiff's case the trial court sustained defendant's motion to direct the jury to find the City of Chicago not guilty, because the notice served did not comply with the statute in that it failed to state plaintiff's address. The jury returned a verdict as directed and judgment was entered thereon. This appeal followed.

Plaintiff's complaint, including the defective notice, was filed April 9, 1934. The defendant filed its answer April 25, 1934, in which it denied the negligence charged and demanded proof by plaintiff as to the care exercised by her at the time of the occurrence, as to her injuries and as to the service of the statutory notice. Thereafter, on February 13, 1935, the defendnat was allowed to file an amendment to its answer, which denied "that the Notice of the alleged accident served on the City of Chicago and set forth in paragraph 6 of the complaint is a sufficient Notice" and asserted that it "does not comply with the statute requiring said Notice to

583 I.A. 629

appeal from	(	GORA B. SPENCER,
Superior Court,	)	Appellant,
Cook County,)	
	)	vs.
	)	CITY OF CHICAGO,
	)	Municipal Corporation,
	)	Appellee.

IN THE COURT OF THE COMMON PLEAS OF THE COUNTY OF COOK, ILLINOIS.

This is an action brought by Plaintiff, Gora B. Spencer, against defendant, City of Chicago, to recover damages for personal injuries alleged to have been sustained by her January 22, 1934, as the result of falling on a defective curb stone and sidewalk in said city of Chicago. On March 3, 1934, forty-six days after the accident, Plaintiff served the statutory notice provided under the Illinois Act upon defendant by leaving a copy thereof with William H. Weston, Alexander M. Weinstein and Peter J. Brady, corporation counsel, city attorney and city clerk, respectively, of said city. Such notice failed to state Plaintiff's address. At the close of Plaintiff's case the trial court sustained defendant's motion to direct the jury to find the City of Chicago not guilty, because the notice served did not comply with the statute in that it failed to state Plaintiff's address. The jury returned a verdict as directed and judgment was entered thereon. This appeal followed.

Plaintiff's complaint, including the defective notice, was filed April 9, 1934. The defendant filed its answer April 11, 1934, in which it denied the negligence charged and demanded proof by Plaintiff as to the care exercised by her at the time of the occurrence as to her injuries and as to the service of the statutory notice. Thereafter, on February 14, 1935, the defendant was allowed to file an amendment to its answer, which denied "that the notice of the alleged accident served on the City of Chicago and set forth in paragraph 6 of the complaint is a sufficient notice" and requested that it "does not comply with the statute requiring said notice to

be given, in that no address or place of residence of the plaintiff is set forth in said Notice."

In the presentation of plaintiff's case she introduced in evidence over defendant's objection a carbon copy of a letter dated February 21, 1934, which contained her address and which she claimed was mailed to "William H. Sexton, Esq.," then corporation counsel of the City of Chicago, suggesting an adjustment of her claim. Notice had been served on defendant to produce the original of such letter, but it declared its inability to do so.

Plaintiff contends that the letter sent to the corporation counsel prior to her service of the purported statutory notice upon the aforesaid officers of the defendant cured the alleged defect in said statutory notice since it designated plaintiff's address; that "by filing an answer that amounted to a general issue" the defendant waived any defect in the statutory notice; and that the city took undue advantage of plaintiff by waiting until after the expiration of the six months provided by statute for the service of the notice to file the amendment to its answer, calling attention to the defect in the notice.

Defendant's theory is that the service of the notice required by statute is mandatory; that plaintiff's address is one of the essential requirements prescribed in the statute and that the failure to include same in such notice renders it fatally defective; that the failure to designate the address of the injured party in the notice is such a defect as cannot be cured by the letter written to the corporation counsel of the City of Chicago prior to the service of the notice, which letter stated said address; that the filing ^{or} an answer in the nature of a plea of the general issue "did not waive the question of a defective notice;" and that no question of good faith is involved in this cause.

Section 2 of "An Act concerning suits at law for personal injuries against cities, villages and towns (par 7, sec 2, ch. 70, Ill. State Bar Stats. 1935) requires that "any person who is about to bring any action or suit at law in any court against any incorporated city, village or town for damages on account of any personal injury shall, within six months from the date of the injury, or when the cause of action accrued, either by himself, agent or attorney, file in the office of the city attorney (if there is a city attorney, and also in the office of the city clerk) a statement in writing, signed by such person,, his agent or attorney, giving the name of the person to whom such cause of action has accrued, the name and residence of the person injured, the date and about the hour of the accident, the place or location where such accident occurred and the name and address of the attending physician (if any)."

In Erford v. City of Peoria, 229 Ill. 547, the Supreme Court held that the notice required by sec. 2 as above set forth is mandatory and a condition precedent to the right to bring such an action against a municipality. In Walters v. City of Ottawa, 240 Ill. 259, the court held at p. 263: "The statute expressly declares that if the required notice is not given, any suit brought shall be dismissed and the plaintiff barred from further suing. The city has no power to waive the notice and is under no liability until it is given." In Quimette v. City of Chicago, 242 Ill. 501, the court said: "The question of notice is entirely within legislative control" and "that the wrong date in the notice is, in effect the same as if no date at all were given." In Gordon v. City of Chicago, 249 Ill. 596, it was held that "The notice attached to the affidavits was defective because it did not state about the hour of the accident."

In Swenson v. City of Aurora, 196 Ill. App. 83, the court said at p. 92:

"But the most serious defect in the notice in question is the failure of appellee to state his place of residence. The residence given in the notice was not his and never had been. The omission of the place of residence is clearly fatal to the validity of the notice. And it is clear that this defect cannot be cured by the

Section 2 of "An act concerning suits at law for damages
 and injuries against cities, villages and towns (chap. 2, sec. 2, ch. 7)
 Ill. State Bar Stat. 1935) requires that "any person who is about to
 bring any action or suit at law in any court against any incorporated
 city, village or town for damages on account of any personal injury
 shall, within six months from the date of the injury, or when the cause
 of action accrued, either by himself, agent or attorney, file in the
 office of the city attorney (if there is a city attorney, and also in
 the office of the city clerk) a statement in writing, signed by such
 person, his agent or attorney, giving the name of the person to whom
 such cause of action has accrued, the name and residence of the person
 injured, the date and about the hour of the accident, the place or lo-
 cation where such accident occurred and the name and address of the
 attending physician (if any)."

In Exford v. City of Chicago, 230 Ill. 147, the Supreme
 Court held that the notice required by sec. 2 as above set forth is
 mandatory and a condition precedent to the right to bring such an
 action against a municipality. In Walters v. City of Chicago, 230 Ill.
 153, the court held at p. 153: "The statute expressly declares that
 if the required notice is not given, any suit brought shall be dis-
 missed and the plaintiff barred from further action. The city has no
 power to waive the notice and is under no liability until it is given."
 In Quintette v. City of Chicago, 241 Ill. 101, the court said: "The
 question of notice is entirely within legislative control, and 'time
 the wrong date in the notice is, in effect the same as if no notice at
 all were given.' In Gordon v. City of Chicago, 241 Ill. 830, it was
 held that 'The notice attached to the affidavits was defective because
 it did not state about the hour of the accident.'"

In Johnson v. City of Chicago, 190 Ill. 390, 391, the court

said at p. 391:

"But the most serious defect in the notice in question is the
 failure of appellee to state his place of residence. The residence
 given in the notice was not his and never has been. The omission
 of the place of residence is clearly fatal to the validity of the

showing that he resided at some other place on the same street, for it is the very fact that he resided at some other place than the one mentioned in the notice that renders the notice invalid. Unquestionably, the purpose which the Legislature had in view in requiring the notice to state the name and address of the party injured and the name and address of the attending physician was to give cities, towns and villages in cases of this kind correct information, upon which they could properly pursue their investigation, to ascertain the extent and nature of the injury suffered by the person injured, which in many cases might become, as it did on the trial of this case, an important and controverted question. It is evident therefore, that a definite and correct statement as to the residence of the party injured, in the notice, is of co-ordinate importance with a correct and definite statement of the place where the injury occurred."

It is manifest from the above decisions that the notice filed with the officials of the City of Chicago in the instant case was fatally defective and precluded plaintiff from maintaining her action. In Minnis v. Friend, 360 Ill. 328, where the notice was held defective because it lacked the signature of the person injured or his agent or attorney, the court said, "The notice should not have been admitted in evidence and a motion to direct a verdict for the City of Chicago at the close of plaintiff's evidence should have been allowed." Inasmuch as plaintiff's notice was invalid and inadmissible in evidence, it is idle to urge that it was cured or could be cured by the letter containing her address, heretofore referred to, from plaintiff's attorney to defendant's corporation counsel.

The record discloses no objection on the part of plaintiff to the order of the court allowing defendant to file the amendment to its answer which challenged the validity of the notice, and it has been repeatedly held that a question not raised in the trial court cannot be presented for the first time on appeal. Defendant's original answer, if it waived anything, could only be held to have waived defects as to form in plaintiff's complaint. The defect in question in plaintiff's notice was material and substantial in that it constituted a failure to comply with one of the essential requirements of the statute. In our opinion the trial court did not abuse its discretion in allowing defendant to amend its answer.

In answer to plaintiff's claim that the defendant was

showing that he resided at some other place on the same street, for it is the very fact that he resided at one other place than the one mentioned in the notice that renders the notice invalid. Furthermore, the notice to state the name and address of the party injured and the name and address of the standing plaintiff was to give notice to the towns and villages in case of this kind correct information, on which they could properly make their investigation, to ascertain the extent and nature of the injury suffered by the person injured, which in many cases might become, as it did on the trial of this case, an important and controverted question. It is evident, therefore, that a definite and correct statement as to the residence of the party injured, in the notice, is of co-ordinate importance with a correct and definite statement of the place where the injury occurred."

It is manifest from the above decision that the notice filed with the officials of the City of Chicago in the instant case was fatally defective and precluded plaintiff from maintaining her action. In Smith v. Friend, 380 Ill. 328, where the notice was held defective because it lacked the signature of the person injured or his agent or attorney, the court said, "The notice should not have been admitted in evidence and a motion to direct a verdict for the City of Chicago at close of plaintiff's evidence should have been allowed." Although the plaintiff's notice was invalid and inadmissible in evidence, it is able to urge that it was correct or could be cured by the letter containing her address, heretofore referred to, from plaintiff's attorney to defendant's corporation counsel.

The record discloses no objection on the part of plaintiff to the order of the court allowing defendant to file the amendment to its answer which challenged the validity of the notice, and it has been repeatedly held that a question not raised in the trial court cannot be presented for the first time on appeal. Defendant's original answer, if it waived anything, could only be held to have waived defect as to form in plaintiff's complaint. The defect in question in plaintiff's notice was material and substantial in that it constituted a failure to comply with one of the essential requirements of the statute. In our opinion the trial court did not abuse its discretion in allowing defendant to amend its answer.

guilty of bad faith in failing to call her attention to her defective notice within the six month period allowed for filing notice so that she might have cured same, it is sufficient to state that it was the duty of plaintiff and her attorney to file a proper valid notice that complied with the statute, the provisions of which are clear and unambiguous. There is no question of bad faith on the part of defendant involved in this case.

For the reasons stated herein the judgment of the Superior court is affirmed.

AFFIRMED.

FRIEND and SCANLAN, JJ., concur.

ality of bad faith in failing to call her attention to her defective notice within the six month period allowed for filing notice so that she at least had time to correct same, it is entitled to state that it was the duty of plaintiff and her attorney to file a proper valid notice that complied with the statute, the provisions of which are clear and unambiguous. There is no question of bad faith on the part of defendant involved in this case. For the reasons stated herein the judgment of the court is affirmed.

ATTEST.

FILED and SOALMAN, J., concur.

PETER L. EVANS, as Successor Trustee,
Plaintiff,

vs.

WORTHIE W. HAYNES, et al,
Defendants,

PETER L. EVANS,
Appellant,

vs.

WILBUR E. HOWETT, et al,
Appellees,



Appeal from
Circuit Court
Cook County.

287 I.A. 629³

MR. PRESIDING JUSTICE SULLIVAN
DELIVERED THE OPINION OF THE COURT.

This appeal seeks to reverse an order entered by the Circuit court removing Peter L. Evans as trustee under the trust deed being foreclosed, as trustee in possession of the mortgaged premises and as receiver therefor. The appellees filed no brief.

Peter L. Evans (hereinafter for convenience referred to as the respondent) was by the terms of the trust deed foreclosed in this proceeding designated and appointed successor trustee to the Home Bank & Trust Company, the original trustee, which filed the complaint herein but became insolvent during the pendency of this cause. The bank through its receiver resigned as trustee and the respondent acting as successor trustee in its place and stead was substituted as plaintiff. Evans was placed in possession of the mortgaged property involved February 9, 1933, for the purpose of operating and managing same, which he did until August 1, 1935. On that date objection was raised to his managing the property as trustee after the entry of the decree of foreclosure, and pursuant to such objection an order was entered authorizing him to act as receiver of the premises. The order appointing respondent receiver expressly stated that he was so appointed to obviate any objection which might be raised to his management of the property in the capacity of trustee after entry of the decree of foreclosure. April 2, 1936, one

PETER L. EVANS, as Trustee or Receiver,
Plaintiff,

vs.

WORTHINGTON E. HOWETT, et al,
Defendants,

PETER L. EVANS,

Appellant,

vs.

WORTHINGTON E. HOWETT, et al,
Appellees,

Appeal from

Circuit Court

Cook County.

357 I.A. 628

MR. CHIEF JUSTICE WILLIAM
DELIVERED THE OPINION OF THE COURT.

This appeal seeks to reverse an order entered by the Circuit Court removing Peter L. Evans as trustee under the trust deed being foreclosed, as trustee in possession of the mortgaged premises and as receiver therefor. The appellees filed no brief.

Peter L. Evans (hereinafter for convenience referred to as the respondent) was by the terms of the trust deed foreclosed in this proceeding designated and appointed successor trustee to the Home Bank & Trust Company, the original trustee, which filed the complaint herein but became insolvent during the pendency of this cause. The bank through its receiver resigned as trustee and the respondent acting as successor trustee in its place and stand was substituted as plaintiff. Evans was placed in possession of the mortgaged property involved February 3, 1935, for the purpose of operating and managing same, which he did until August 1, 1935. On that date objection was raised to his managing the property as trustee after the entry of the decree of foreclosure, and pursuant to such objection an order was entered authorizing him to act as receiver of the premises. The order appointing respondent receiver expressly stated that he was so appointed to obviate any objection which might be raised to his management of the property in the capacity of trustee after entry of the decree of foreclosure. April 2, 1935, one

Wilbur E. Howett and others, purporting to act as agents for certain holders of bonds secured by the trust deed in question, filed a verified petition seeking the removal of the respondent as trustee and as receiver. The petition contained no charges of fraud, misconduct or mismanagement on the part of the respondent as trustee or receiver, except the claimed assertion that he leased the premises at an inadequate rental. The petition further charged, however, that Evans had been ordered to make a report as receiver to the court, which had not been made, and that certain accounts payable of the owner, who had theretofore been placed in possession of the property in lieu of a receiver, had not been paid, although respondent had been directed to pay them by order of court. The petition did not charge that any property or moneys coming into the hands of the respondent as trustee or receiver had been illegally disbursed, wasted or misapplied.

Evans filed a verified answer denying the material allegations of the petition and the matter was set down for hearing April 6, 1935. A hearing was held on that day, at which no evidence was introduced to support the charges made in the petition. Additional hearings consisting only of colloquy between court and counsel and statements and argument of counsel were thereafter had, but no sworn testimony or evidence of any kind was offered or received at such hearings. At these hearings unsupported and unverified statements were made by counsel representing the petitioners and counsel for the respondent repeatedly objected to the method of procedure, requesting an opportunity to be heard and to submit evidence. On the late afternoon of April 8, 1936, at the conclusion of such hearings as were had, the court instructed counsel for respondent to draft and present to counsel for all interested parties an order containing provisions for the removal of Evans as trustee and receiver and directing him to file his final account in ten days. Notwithstanding that the court had instructed counsel for Evans to draft and present the order indicated, the following day, April 9, 1936, an order removing the respondent as trustee and receiver was presented to the court by someone from the office of

Alburt E. Howett and others, purporting to act as agents for certain holders of bonds secured by the trust fund in question, filed a verified petition asking the removal of the respondent as trustee and as receiver. The petition contained no charges of fraud, misconduct or mismanagement on the part of the respondent as trustee or receiver, except the claimed assertion that he leased the premises at an inadequate rental. The petition further charged, however, that Evans had been ordered to make a report as receiver to the court, which had not been made, and that certain accounts payable of the owner, who had theretofore been placed in possession of the property in lieu of a receiver, had not been paid, although respondent had been directed to pay them by order of court. The petition did not charge that any property or money coming into the hands of the respondent as trustee or receiver had been illegally disbursed, wasted or misapplied.

Evans filed a verified answer denying the material allegations of the petition and the matter was set down for hearing April 8, 1935. A hearing was held on that day, at which no evidence was introduced to support the charges made in the petition. Additional hearings consisting only of colloquy between court and counsel and statements and argument of counsel were thereafter had, but no sworn testimony or evidence of any kind was offered or received at such hearings. At these hearings unsupported and unverified statements were made by counsel representing the petitioner and counsel for the respondent repeatedly objected to the method of procedure, requesting an opportunity to be heard and to submit evidence. On the last afternoon of April 8, 1935, at the conclusion of such hearings as were had, the court instructed counsel for respondent to draft and present to counsel for all interested parties an order containing provisions for the removal of Evans as trustee and receiver and directing him to file his final account in ten days. Notwithstanding that the court had instructed counsel for Evans to draft and present the order indicated, the following day, April 9, 1935, an order removing the respondent as trustee

Attorney H. J. Rosenberg and no previous notice of the presentation of this order to the court was given to counsel for any of the interested parties, nor were they given an opportunity to examine the same before its presentation. This order, which was entered by the court in the absence of counsel for the petitioners and respondent, did not in all respects conform to the directions of the court and, as has been stated, was prepared not by respondent's counsel as instructed by the court but by counsel for another party in interest in the foreclosure proceeding who did not represent any of the petitioners on whose behalf the immediate petition was filed.

Pursuant to notice, counsel for respondent presented to the court April 13, 1936, the order removing respondent as trustee and receiver, which he had been directed by the court to prepare. The court refused to enter this order and informed counsel for respondent and the other counsel present that an order removing Evans as trustee and receiver had already been entered. At this hearing a Mr. Fishman from Attorney Rosenberg's office, admitted presenting the order which had been entered and also admitted that he had neglected to include therein a provision fixing the amount of the appeal bond as fixed by the court April 9, 1936. Counsel for the respondent called the court's attention to the fact that he was not present at the time of the presentation of the order entered April 9, 1936, and that he did not have an opportunity to examine it before its entry. He then objected to the entry of said order of April 9, 1936, and the procedure followed in connection with its entry, but without avail. The court allowed the order of April 9, 1936, to stand, permitting it to be amended to show the amount of the appeal bond as previously fixed. Thereafter, on April 20, 1936, respondent presented a petition and motion to vacate the order of April 9, 1936, removing him as trustee and as receiver, which order was peremptorily denied by the court without affording respondent an opportunity to be heard on his motion and petition. The order of April 9, 1936, contained a number of findings of fact which were totally unsupported

[illegible]

by evidence introduced at any of the hearings and some of the findings contained therein are not even supported by the allegations of the petition presented for the removal of respondent.

Respondent contends that the finding and order of the trial court are not supported by any evidence; that the court was without power to remove him as trustee except upon presentation of a proper petition charging misconduct or other acts inconsistent with his duties as trustee, and then only after a hearing at which he was afforded an opportunity to present evidence in his defense; that the court abused its discretion in ordering the removal of the respondent as receiver without requiring evidence in support of the allegations of the petition for his removal; that the court erred in denying respondent the right to be heard on the charges against him contained in the petition; that the court erred in not requiring petitioners to prove that they had a beneficial interest in the trust estate before removing respondent as trustee; and that the court erred in entering the order of removal without notice to the parties of its entry and without giving them an opportunity to examine such order before it was entered.

The chancellor heard no evidence in support of the charges contained in the aforementioned petition and absolutely refused to hear evidence which the respondent requested that he be permitted to offer to refute such charges. The law is settled in this state that a trustee cannot be removed except upon charges of breach of trust, dishonesty, fraud, mismanagement or some other breach of fiduciary duty and then only after a hearing on evidence offered and received in support of the charges and an opportunity afforded the trustee to refute same. (Cohen v. Central Republic Trust Company, 282 Ill. App. 569; People v. Powell, 353 Ill. 582; White v. Macqueen, 360 Ill. 236; Bauer v. Lindgren, 279 Ill. App. 397; In re- Scott, 62 N. Y. S. 1059; In re-Kilgore, 22 N.E. 104; Perry on Trusts, 6th Ed. Secs. 276, 277.) That this rule is generally recognized appears from 65 C. J. 633, sec. 482, where it is stated:

"This general rule applied to the removal of trustees is that such removal should not be made unless there are acts or circumstances endangering the trust fund, such as mismanagement, incompetency, or

by evidence introduced at any of the hearings and none of the findings contained therein are not even supported by the allegations of the petition presented for the removal of respondent.

Respondent contends that the findings and order of the trial court are not supported by any evidence; that the court was without power to remove him as trustee except upon presentation of a proper petition charging misconduct or other acts inconsistent with his duties as trustee, and then only after a hearing at which he was afforded an opportunity to present evidence in his defense; that the court abused its discretion in ordering the removal of the respondent as receiver without requiring evidence in support of the allegations of the petition for his removal; that the court erred in denying respondent the right to be heard on the charges against him contained in the petition; that the court erred in not requiring petitioners to prove that they had a beneficial interest in the trust estate before removing respondent as trustee; and that the court erred in entering the order of removal without notice to the parties at its entry and without giving them an opportunity to examine and order before it was entered.

The chancellor heard no evidence in support of the charges contained in the aforementioned petition and accordingly refused to hear evidence which the respondent requested that he be permitted to offer to refute such charges. The law is settled in this state that a trustee cannot be removed except upon charges of breach of trust, dishonesty, fraud, mismanagement or some other breach of fiduciary duty and when only after a hearing on evidence offered and received in support of the charges and an opportunity afforded the trustee to refute same.

Graham v. Central Republic Trust Company, 287 Ill. App. 504; People v. Howell, 353 Ill. 522; White v. Wehrman, 350 Ill. 120; Bank v. Albrecht, 353 Ill. App. 327; In re Scott, 82 N. D. 1022; In re Elliott, 82 N. D. 1024; Perly on Trust, 424 N. D. 222, 227. That this rule is generally recognized appears from 28 C. J. 521, sec. 422, where it is stated:

"This general rule applied to the removal of trustees is that

dishonesty."

It was not even shown that the petitioners who sought the trustee's removal or those they claimed to represent were beneficially interested in any manner in the trust estate. The established rule is that only a party beneficially interested in the trust estate may petition the court for the removal of a trustee. The right to apply for removal of a trustee will be denied to persons lacking the requisite interest in the execution of the trust. (65 C. J. 629, sec. 470; Cohen v. Central Trust Company, supra; Holman v. Renaud, 125 S. W. 843.)

One of the grounds alleged in the petition for the removal of Evans as receiver was that he was not qualified to act in that capacity since he was the trustee plaintiff in the proceeding. It is a generally recognized rule that a party to the suit should not be appointed receiver therein. Iroquois Furnace v. Kimbark, 85 Ill. App. 399; High on Receivers, 3rd ed. 70; Benneson v. Bill, 62 Ill. 408; Finance Co., v. C. R. R. Co., 45 Fed. Rep. 436.) Where, however, all of the parties in interest agree to or acquiesce in the appointment of a trustee as receiver, we perceive no equitable or legal bar to such appointment. In the instant case no objection was raised to Evans acting as receiver of the premises except by the petitioners, and, their interest in the property involved not having been shown, the chancellor was not justified in removing respondent as receiver on their petition. As to the other grounds alleged for the removal of Evans as receiver, no evidence was offered by the petitioners to substantiate the charges made and the rules heretofore set forth as to the removal of a trustee are applicable to the removal of a receiver.

In any event, the entry of the order removing Evans as trustee and as receiver without notice to the parties and without giving them an opportunity to examine same, constituted an unwarranted abuse of discretion by the chancellor. It will be remembered that on April 8, 1936, the chancellor instructed counsel for the respondent to draft the order of removal and present same to counsel for all interested parties

Alphonse.

It was not even shown that the petitioners who sought a trustee's removal or those they claimed to represent were beneficially interested in any manner in the trust estate. The established rule is that only a party beneficially interested in the trust estate may petition the court for the removal of a trustee. The right to apply for removal of a trustee will be denied to persons lacking the requisite interest in the execution of the trust. (35 C. J. 622, sec. 470; Golden v. Central Trust Company, supra; Holman v. Lewis, 125 N. J. 843.)

One of the grounds alleged in the petition for the removal of Evans as receiver was that he was not qualified to act in that capacity since he was the trustee plaintiff in the proceeding. It is a generally recognized rule that a party to the suit should not be appointed receiver therein. Isabelle Lawrence v. Kibben, 23 Ill. App. 326; Wright on Receivers, 3rd ed. 70; Johnson v. Hill, 22 Ill. 400; Winters v. W. & L. Co., 43 Fed. Rep. 456. However, all of the parties in the instant case agreed to or acquiesced in the appointment of a trustee as receiver. There is no equitable or legal bar to such appointment. In the instant case no objection was raised to Evans acting as receiver of the proceeds except by the petitioners, and, their interest in the property involved having been shown, the Chancellor was not justified in removing Evans as receiver on their petition. As to the other grounds alleged in the removal of Evans as receiver, no evidence was offered by the petitioners to substantiate the charges made and the rules heretofore set forth as to the removal of a trustee are applicable to the removal of a receiver.

In any event, the entry of the order removing Evans as receiver and as receiver without notice to the parties and without giving them an opportunity to be heard, constituted an unwarranted invasion of their rights. It will be remembered that on April 1, 1915, the Chancellor instructed counsel for the respondent to file the order of removal and present same to counsel for all interested parties.

and that, notwithstanding such instruction, on the very next day, April 9, 1936, the order of removal in question, prepared and presented by counsel for a party not interested in the immediate proceeding, was entered without notice to counsel for any of the other parties. The action of the court in this regard was highly improper and cannot be countenanced.

For the reasons indicated herein the order of the Circuit court of April 9, 1936, is reversed and the cause remanded with directions to allow the parties a proper hearing on the merits on the petition for the removal of the respondent as trustee and receiver and the respondent's answer thereto.

REVERSED AND REMANDED
WITH DIRECTIONS.

and that, notwithstanding such instruction, on the very next day, April 2, 1936, the order of removal in question, prepared and presented by counsel for a party not interested in the immediate proceedings, was entered without notice to counsel for any of the other parties. The action of the court in this regard was highly improper and cannot be countenanced.

For the reasons indicated herein the order of the circuit court of April 2, 1936, is reversed and the cause remanded with directions to allow the parties a proper hearing on the writs on the petition for the removal of the respondent as trustee and receiver and the respondent's answer thereto.

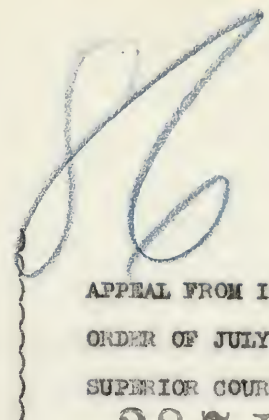
REVEREND AND HONORABLE
THE JUDGES.

39211

ELSA HOOKANSON,
Appellee,

v.

CHICAGO CITY BANK & TRUST
COMPANY, a corporation,
Appellant.



APPEAL FROM INTERLOCUTORY
ORDER OF JULY 24, 1936 OF
SUPERIOR COURT OF COOK COUNTY.
287 I.A. 630¹

MR. PRESIDING JUSTICE SULLIVAN
DELIVERED THE OPINION OF THE COURT.

This appeal seeks to reverse an order entered by the Superior court July 24, 1936, granting plaintiff, Elsa Hookanson, a temporary injunction against defendant, Chicago City Bank & Trust Company (hereinafter referred to as the bank) without notice and without bond. When the court on August 10, 1936, continued its motion to dissolve the injunction to September 21, 1936, defendant filed its notice of appeal August 19, 1936.

The injunction was ordered solely upon the allegations of count four of the complaint, which are in substance that plaintiff is a resident of Chicago and defendant is a bank; that plaintiff was the owner and holder of a note for \$7,500 secured by trust deed, which she deposited as collateral security with the bank to secure an indebtedness due from her to defendant upon her collateral note; that default having been made in payment of interest due upon her note secured by the trust deed, which plaintiff had deposited with the bank as collateral, defendant through its attorneys foreclosed said trust deed in the name of plaintiff and obtained a decree of foreclosure and sale of the property described therein; that such property was bid in at the sale October 2, 1933, in the name of plaintiff for \$8,200, which

30211

WILLIAM H. HARRISON,
Appellee,

CHICAGO CITY BANK & TRUST
COMPANY, a corporation,
Appellant.

MR. JUSTICE THOMAS M. SWAN
DELIVERED THE OPINION OF THE COURT.

This appeal seeks to reverse an order entered by the
superior court July 24, 1936, granting plaintiff, Willam H. Harrison,
a temporary injunction against defendant, Chicago City Bank &
Trust Company (hereinafter referred to as the bank) without
notice and without bond. When the court on August 10, 1936,
continued its motion to dissolve the injunction to September
21, 1936, defendant filed its notice of appeal August 12, 1936.
The injunction was ordered solely upon the allegations
of count four of the complaint, which are in substance that
plaintiff is a resident of Chicago and defendant is a bank;
that plaintiff was the owner and holder of a note for \$5,000
secured by trust deed, which was deposited on collateral security
with the bank to secure an indebtedness due from her to defendant
upon her collateral note; that defendant having been made in payment
of interest due upon her note secured by the trust deed, which
plaintiff had deposited with the bank as collateral, defendant
through its attorneys foreclosed said trust deed in the name of
plaintiff and obtained a decree of foreclosure and sale of the
property described therein; that such property was sold in at the
sale October 2, 1935, in the name of plaintiff for \$5,000, which

387 I.A. 680
DIVISION COURT OF COV. COURT
ORDER OF JULY 24, 1936
ALFRED H. HARRISON

was less than the amount due under the decree; that the sale was confirmed and a deficiency decree entered in favor of plaintiff for \$943.22; that plaintiff indorsed the master's certificate of sale in blank and the bank held it as collateral security for plaintiff's indebtedness to it; that the bank "held the said certificate for collateral purposes only as collateral security to the plaintiff's several notes executed from time to time, each in renewal of another, the last of which notes was executed April 23, 1926, due 60 days after date, for the principal sum of \$7,637.10;" that in addition to said master's certificate defendant continued to hold as collateral security for the payment of plaintiff's renewal collateral note of April 23, 1936, five real estate loans notes signed by Emma Flack Chavis, in the aggregate par amount of \$9,825, an extension agreement, a trust deed, a mortgage policy and an insurance policy, all pertaining to property at 5221 South Michigan avenue, as well as a certificate of deposit for a bond signed by Etta M. Whittingham for \$1,000; that plaintiff is informed that since April 23, 1936, defendant has exchanged the \$9,825 Chavis notes and received in lieu thereof \$3,200 Home Owners Loan Corporation bonds signed by said Chavis, which bonds are plaintiff's property; that without plaintiff's knowledge and consent defendant, through its agents and officers, caused the name of William E. Fisher, then one of the bank's attorneys and agents, to be inserted in the master's certificate over her blank indorsement, purporting to complete the assignment of the certificate to the bank; that the period of redemption of the property involved in the foreclosure proceeding expired October 3, 1934, and the owner of the equity therein, Walter Zwinskes, lived and resided in part of the premises and rented the remaining portion thereof since the date of the sale; that May 18, 1936, without the knowledge and

was less than the amount due under the decree; that the sale was confirmed and a deficiency decree entered in favor of Plaintiff for \$243.23; that Plaintiff informed the master's certificate of sale in blank and the bank held it as collateral security for Plaintiff's indebtedness to it; that the bank held the said certificate for collateral purposes only as collateral security to the Plaintiff's several notes executed from time to time, each in renewal of another, the last of which notes was executed April 23, 1936, due 60 days after date, for the principal sum of \$7,637.10; that in addition to said master's certificate of sale and continued to hold as collateral security for the payment of Plaintiff's renewal collateral note of April 23, 1936, five real estate promissory notes signed by Mrs. Frank Chavis, in the aggregate pay amount of \$5,825, an extension agreement, a trust deed, a mortgage policy and an insurance policy, all pertaining to property at 3221 North Michigan Avenue, as well as a certificate of deposit for a bond signed by Mrs. M. Wittingham for \$1,000; that Plaintiff is informed that since April 23, 1936, defendant has exchanged the \$5,825 Chavis notes and received in lieu thereof \$3,200 Home Owners Loan Corporation bonds signed by said Chavis, which bonds are Plaintiff's property; that without Plaintiff's knowledge and consent defendant, through its agents and clerks, caused the name of William E. Fisher, then one of the bank's attorneys and agents, to be inserted in the master's certificate over her blank endorsement, purporting to complete the assignment of the certificate to the bank; that the period of redemption of the property involved in the foreclosure proceeding expired October 3, 1936, and the owner of the equity therein, Walter Sannick, lived and resided in part of the premises and rented the remaining portion thereof since the date of the sale; that May 12, 1936, without the knowledge and

consent of plaintiff, defendant, through its agent and attorney William E. Fisher, permitted said Walter Zwinskes to redeem the property from the sale and said William E. Fisher certified the redemption in writing on the master's certificate; that the master's certificate contained an indorsement thereon that Walter Zwinskes paid the full amount for which the real estate described in said certificate was sold, together with interest and costs and that "the sale evidenced by the within certificate has been duly redeemed according to law, and that the certificate and duplicate thereof of record in the office of the recorder of deeds in and for Cook county, Illinois, have become and now is null and void;" and that the master's certificate bearing the certificate of redemption was thereafter rerecorded in the office of the Recorder of Deeds of Cook county.

Count 4 also alleged that "Walter Zwinskes was then required to pay \$9,512 * * * to the defendant for the benefit of this plaintiff for the redemption of said property from said foreclosure sale as required by law;" that "plaintiff has requested and demanded that the defendant credit said redemption money on her note for \$7,637.17 for which it held the said Master's Certificate as collateral, and pay her any sum due her after the satisfaction of her said note, and to surrender all other collateral which it holds for her said note; this the defendant bank has failed and refused to do and threatens it will sell the aforesaid collateral other than the Master Certificate on said note and confess judgment on her said note. That the aforesaid redemption money for said Master Certificate is more than enough to satisfy the plaintiff's said note held by the defendant, and that the said money should as required by law, be applied to satisfy her said note; that she believes that if the defendant is not restrained and enjoined by order of this court that the defendant will sell at a sacrifice

comment of plaintiff, defendant, through its agent and attorney
William H. Fisher, permitted said Walter Swinakes to redeem the
property from the sale and said William H. Fisher certified the
redemption in writing on the master's certificate; that the
master's certificate contained an endorsement thereon that Walter
Swinakes paid the full amount for which the real estate described
in said certificate was sold, together with interest and costs and
that "the sale evidenced by the within certificate has been duly
redeemed according to law, and that the certificate and duplicate
thereof of record in the office of the recorder of deeds in and
for Cook county, Illinois, have become and now is null and void;"
and that the master's certificate bearing the certificate of
redemption was thereafter re-recorded in the office of the recorder
of Deeds of Cook county.

Count 4 also alleged that "after Swinakes was then re-
quired to pay \$9,512 * * * to the defendant for the benefit of
this plaintiff for the redemption of said property from said fore-
closure sale as required by law;" that "plaintiff has requested
and demanded that the defendant credit said redemption money on
her note for \$7,637.17 for which it held the said master's
certificate as collateral, and pay her any sum due her after the
satisfaction of her said note, and to surrender all other collateral
which it holds for her said note; that the defendant bank has failed
and refused to do and threatens it will sell the aforesaid collateral
other than the Master Certificate on said note and convert judgment
on her said note. That the aforesaid redemption money for said
Master Certificate is more than enough to satisfy the plaintiff's
said note held by the defendant, and that the said money should
as required by law, be applied to satisfy her said note; that she
believes that if the defendant is not restrained and enjoined by
order of this court that the defendant will sell at a sacrifice

the aforesaid Home Loan Bonds and said Certificate of Deposit No. 22 for bond No. 30 signed by Etta Whittingham for \$1,000 and any other collateral, which it might have belonging to the plaintiff, and that it will confess judgment on her said note and cause her to defend said judgment, all of which would irreparably injure and damage the plaintiff, and that the defendant should be temporarily enjoined and restrained from so doing, until the further order of the court."

It was further alleged in this count that "the defendant should be required by order or decree of this court to satisfy plaintiff's note, from the redemption money from said foreclosure sale and to surrender said note and the aforesaid bonds, insurance policies, and Trust Deeds, if any, which it holds as collateral for said note, of this plaintiff and render to this plaintiff a full, true and complete statement of moneys received and expended pertaining to said collateral. That the plaintiff believes that said injunction, should issue without notice to the defendant and without bond by this plaintiff that she believes it would be injurious to her interest to give notice of her application for said temporary injunction."

The complaint was filed July 22, 1936, and on July 24, 1936, the order for the temporary injunction was entered as follows:

"It is therefore ordered and decreed, that the Clerk of this court issue the people's writ of injunction restraining the Chicago City Bank and Trust Company, a corporation defendant, its agents and attorneys

"1. From selling, transferring or disposing of, in any way the Home Owners Loan Corporation bonds to wit \$3200.00

"2. The Certificate of Deposit #22 for bond #30 signed by Etta M. Whittingham for \$1,000 all held by it as collateral for plaintiff's note dated April 23, 1936.

"3. And from confessing judgment or suing at law or in equity upon plaintiff's said note held by it for \$7,637.17 until the further order of this court.

"4. For good cause shown plaintiff is excused from giving bond herein."

Defendant contends that the granting of the injunction was

the amount of \$100,000.00 and said Certificate of Deposit
No. 22 for bond No. 30 signed by the Treasurer for \$1,000
and any other collateral, which is being held by the
plaintiff, and that it will continue judgment on her side more
and cause her to defend said judgment, all of which would be
injurious and damage the plaintiff, and that the defendant should be
temporarily enjoined and restrained from so doing, until the further
order of the court."

It was further alleged in this count that the defendant
should be required by order or decree of this court to satisfy plain-
tiff's note, from the redemption money from said Certificate of Deposit
and to surrender said note and the amount of said note, interest there-
on, and trust funds, if any, which it holds as collateral for said
note, of this plaintiff and transfer to this plaintiff a bill, three
and complete statement of monies received and expended pertaining
to said collateral. That the plaintiff believes that said injunc-
tion, should issue without notice to the defendant and without bond
by this plaintiff that she believes it would be injurious to her
interest to give notice of her application for said temporary
injunction."

The complaint was filed July 25, 1935, and on July 26, 1935,
the order for the temporary injunction was entered as follows:
"It is therefore ordered and decreed, that the clerk of
this court issue the plaintiff's writ of temporary restraining order
Chicago City Bank and Trust Company, a corporation defendant,
its assets and - - -
"1. From selling, transferring or disposing of, in any way
the Home Owners Loan Corporation notes to it \$2500.00
"2. The Certificate of Deposit for bond No. 30 signed by
Ella M. Whittington for \$1,000.00 all held by it as collateral for
plaintiff's note dated April 25, 1935.
"3. And from conveying judgment or value at law or in
equity upon plaintiff's said note held by it for \$7,437.17 until
the further order of this court.
"4. For good cause shown plaintiff is awarded from said
bond herein."

Defendant contends that the granting of the injunction was

in violation of its rights as defined in secs. 3 and 9 of an act to Revise the Law in Relation to Injunctions, as Amended, (ch. 69, Ill. State Bar Stats., 1935); that sec. 3 provides that no court shall grant an injunction without previous notice of the time and place of the application therefor unless it shall appear from the complaint or affidavit accompanying same that the rights of the plaintiff will be unduly prejudiced if the injunction is not issued immediately or without notice; that "there was no showing to this effect in the complaint and no affidavit accompanied the same;" that sec. 9 provides "that before an injunction shall issue the plaintiff shall give bond in such penalty and upon such condition and with such surety as may be required by the judge, provided bond may not be required when for good cause shown the court is of opinion that the injunction ought to be granted without bond;" and that no cause was shown that the injunction should be granted without bond.

Plaintiff's theory as stated in her brief is that "there is alleged in the complaint upon which the injunction issued sufficient facts to make it appear to the chancellor issuing the injunction order that plaintiff's property rights would be prejudiced or damaged if he did not issue the order without notice to the defendant, as provided in sec. 3, chap. 69, Ill. State Bar Stats., 1935; and that the Chancellor, within his sound discretion, for good cause shown from the facts alleged in the complaint, properly excused plaintiff from giving bond; and that the injunction order properly issued without notice to the defendant and without bond."

The facts alleged in plaintiff's sworn complaint must be accepted as true and, in our opinion, such facts were sufficient to have made it reasonably appear to the trial court that plaintiff's rights would be unduly prejudiced if the injunction did not issue without notice. It appears from the complaint that the master's certificate, which the bank held as collateral for plaintiff's note

in violation of its rights as defined in sec. 3 and 9 of the act
to revise the law in relation to injunctions, as amended, (Chap.
69, Ill. State Bar State., 1913); that sec. 9 provides that no
court shall grant an injunction without previous notice of the
time and place of the application therefor unless it shall appear
from the complaint or affidavit accompanying same that the rights
of the plaintiff will be unduly prejudiced if the injunction is
not issued immediately or without notice; that "there was no showing
to this effect in the complaint and no affidavit accompanying the
same;" that sec. 9 provides "that before an injunction shall issue
the plaintiff shall give bond in such penalty and upon such condition
and with such surety as may be required by the judge, provided bond
may not be required when a good cause shown the court is of opinion
that the injunction ought to be granted without bond;" and that no
cause was shown that the injunction should be granted without bond.
Plaintiff's theory as stated in her brief is that "there is
alleged in the complaint upon which the injunction issued sufficient
facts to make it appear to the Chancellor issuing the injunction
order that plaintiff's property rights would be prejudiced or damaged
if he did not issue the order without notice to the defendant, as
provided in sec. 9, Chap. 69, Ill. State Bar State., 1913; and that
the Chancellor, within his sound discretion, for good cause shown
from the facts alleged in the complaint, properly exempted plaintiff
from giving bond; and that the injunction order properly issued
without notice to the defendant and without bond."
The facts alleged in plaintiff's sworn complaint must be
accepted as true and, in our opinion, such facts were sufficient
to have made it reasonably appear to the trial court that plaintiff's
rights would be unduly prejudiced if the injunction did not issue
without notice. It appears from the complaint that the order

for \$7,637.17, due June 23, 1936, evidenced the sale of the property in question October 2, 1933, to plaintiff for \$8,200. The bank had without plaintiff's knowledge or consent caused to be inserted over her blank indorsement in the master's certificate the name of William E. Fisher, one of its agents and attorneys, as her assignee. May 18, 1936, to redeem the property the mortgagor paid to the bank's agent and attorney \$9,512, which included the amount for which the property was sold at the foreclosure sale and interest on same. Learning of the redemption, plaintiff demanded of the bank that it apply the aforesaid redemption money received by it to the satisfaction of her note. This the bank failed and refused to do. The bank held as additional collateral security for the payment of plaintiff's note \$3,200 of Home Owners Loan Corporation bonds and a certificate of deposit for another bond of \$1,000, which it threatened to sell, as well as to confess judgment upon her note. Plaintiff believed that defendant would execute its threat so made, sell the bonds held as collateral to her note and confess judgment on said note, if not restrained, causing her irreparable injury and damage.

There was ample justification for the chancellor to fairly conclude from these facts and others alleged in the complaint that, in view of its refusal to turn over to plaintiff the aforementioned bonds and balance of cash, if any, remaining in its hands after paying itself the money due on plaintiff's note with interest thereon, and its threat to sell said bonds and to confess judgment on the note, the bank might or would sell or transfer the bonds between the time of the service of notice of the application for the injunction and the hearing upon such application, in which event plaintiff's rights would be unduly prejudiced.

In Skellers v. Meyer, 246 Ill. App. 18, where a temporary injunction was issued before a lease term began, to restrain the

In Wells v. Wells, 246 Ill. App. 18, where a temporary injunction was issued before a lease term began, to restrain the defendant from selling the property, the court held that the plaintiff's right to the property was not defeated by the sale of the property for \$7,500.17, on June 28, 1936, evidenced the sale of the property in question October 2, 1937, to plaintiff for \$8,200. The bank had without plaintiff's knowledge or consent caused to be inserted over her blank endorsement in the master's certificate the name of William F. Fisher, one of its agents and attorneys, as her assignee. May 18, 1936, to redeem the property the mortgagee paid to the bank's agent and attorney \$8,212, which included the amount for which the property was sold at the foreclosure sale and interest on same. Learning of the redemption, plaintiff demanded of the bank that it apply the for said redemption money received by it to the satisfaction of her note. This the bank failed and refused to do. The bank held as additional collateral security for the payment of plaintiff's note \$3,200 of Home Owners Loan Corporation bonds and a certificate of deposit for another bond of \$1,000, which it threatened to sell, as well as to confess judgment upon her note. Plaintiff believed that defendant would execute the threat so made, sell the bonds held as collateral to her note and confess judgment on said note, if not restrained, causing her irreparable injury and damage. There was ample justification for the injunction to fairly conclude from these facts and others alleged in the complaint that in view of the refusal to turn over to plaintiff the aforementioned bonds and balance of cash, if any, remaining in its hands after paying itself the money due on plaintiff's note with interest thereon, and the threat to sell said bonds and to confess judgment on the note, the bank might or would sell or transfer the bonds before the time of the service of notice of the application for the injunction and the hearing upon such application, in which event plaintiff's rights would be irreparably prejudiced.

In Wells v. Wells, 246 Ill. App. 18, where a temporary injunction was issued before a lease term began, to restrain the

lessor from leasing adjacent property contrary to the terms of the prior lease on the property in dispute, this court said at p. 21:

"The chancellor might well have been of the opinion that if notice had been given to the defendants they would have proceeded at once to consummate the proposed violation of the covenants of the lease. Under the circumstances the effectiveness of the injunction would largely depend upon the promptness with which it was issued. We think it sufficiently appears that the rights of the complainants might have been unduly prejudiced if notice had been required. Cases approving the issuance of an injunctive order without notice are Stafford v. Swift, 121 Ill. App. 508, Village of Itasca v. Schroeder, 182 Ill. 192. Every such case depends upon its peculiar facts, and citations covering different situations are not helpful."

Instead of alleging the ultimate fact in the language of the statute that "the rights of the plaintiff will be unduly prejudiced" if the injunction is not issued without notice, plaintiff alleged in her complaint that "she believes it would be injurious to her interests to give notice of her application for said temporary injunction." Defendant insists that plaintiff's failure to conform to the exact language of the statute in alleging her apprehension of injury, danger or prejudice to her rights if notice were given, renders her complaint fatally defective. This contention is without merit. While the allegation of plaintiff's complaint that "she believes it would be injurious to her interests" to give notice is somewhat inapt and it is usual and customary to follow the language of the statute in this regard, after all the material and important thing is the allegation of sufficient facts so that it shall appear to the court from the complaint or affidavit accompanying same "that the rights of the plaintiff will be unduly prejudiced" if the injunction is not issued without notice. We repeat that the facts amply justified the chancellor's conclusion that the rights of plaintiff might have been unduly prejudiced if notice had been required.

Objection is next made to the issuing of the injunction without requiring the plaintiff to give bond. The only result of

lessor from the time of the lease to the terms of the prior lease on the property in dispute, this court said at

p. 31:

"The court also might well have been of the opinion that if notice had been given to the defendant they would have proceeded at once to comply with the proposed violation of the covenants of the lease. Under the circumstances the effectiveness of the injunction only largely depends upon the promptness with which it was issued. To think it additionally probable that the rights of the complainant might have been unavailingly prejudiced if notice had been required. Cases approving the issuance of an injunctional order without notice are Stefford v. Stefford, 111 Ill. App. 308, Village of Lisle v. Lisle, 128 Ill. App. 308, 1922, very much case depends upon its peculiar facts, and citations covering different situations are not helpful."

Instead of alluding to the mistake fact in the language of the statute that "the rights of the plaintiff will be unavailingly prejudiced" if the injunction is not issued without notice, plaintiff alleged in her complaint that "she believes it would be injurious to her interests to give notice of her application for said temporary injunction." Defendant insists that plaintiff's failure to so follow to the exact language of the statute in alleging her apprehension of injury, danger or prejudice to her rights if notice were given, renders her complaint fatally defective. This contention is without merit. While the allegation of plaintiff's complaint that "she believes it would be injurious to her interests" to give notice is somewhat imprecise and it is usual and customary to follow the language of the statute in this regard, after all the material and important thing is the allegation of sufficient facts so that it shall appear to the court from the complaint or affidavit accompanying it that "the rights of the plaintiff will be unavailingly prejudiced" if the injunction is not issued without notice. To repeat that the facts fully justified the chancellor's conclusion that the rights of plaintiff might have been unavailingly prejudiced if notice had been required.

Objection is next made to the language of the injunction without requiring the plaintiff to give bond. The only result of

the injunction is to preserve the status quo of plaintiff's property in defendant's possession pending the disposition of this cause on its merits. We can see no good purpose which would be served by requiring plaintiff to file a bond, especially since plaintiff's indebtedness on her note to defendant is \$7,637.17 and interest thereon, and the bank already has in its possession her \$9,512 redemption money, her \$3,200 Home Owners Loan Corporation bonds and her certificate of deposit for another \$1,000 bond. Requirement of a bond is largely within the discretion of the chancellor and his order in this respect will not be disturbed unless there is a clear showing of an abuse of discretion.

(Skelers v. Meyer, supra; City of Kewanee v. Otley, 204 Ill. 402; New Ohio Washed Coal Co. v. Coal Belt Ry. Co., 116 Ill. App. 153; Young v. Federal Union Surety Co., 183 Ill. App. 278; West Side Hospital of Chicago v. Steele, 124 Ill. App. 534.)

The preliminary injunction was not improvidently issued and the order of the superior court is affirmed.

ORDER AFFIRMED.

Friend and Scanlan, JJ., concur.

the instruction is to preserve the status quo of the property in defendant's possession pending the disposition of this cause on its merits. We can see no good purpose which could be served by requiring Plaintiff to file a bond, especially since Plaintiff's indebtedness on her note to Defendant is \$7,837.17 and interest thereon, and the bank already has in its possession the \$9,312 redemption money, has \$3,300 more from Defendant's bonds and her certificate of deposit for another \$3,000 bond. The requirement of a bond is largely within the discretion of the chancellor and his order in this respect will not be disturbed unless there is a clear showing of an abuse of discretion.

(Keefe v. Keefe, 100 N.Y. 2d 111, 113, 115, 117, 119, 121, 123, 125, 127, 129, 131, 133, 135, 137, 139, 141, 143, 145, 147, 149, 151, 153, 155, 157, 159, 161, 163, 165, 167, 169, 171, 173, 175, 177, 179, 181, 183, 185, 187, 189, 191, 193, 195, 197, 199, 201, 203, 205, 207, 209, 211, 213, 215, 217, 219, 221, 223, 225, 227, 229, 231, 233, 235, 237, 239, 241, 243, 245, 247, 249, 251, 253, 255, 257, 259, 261, 263, 265, 267, 269, 271, 273, 275, 277, 279, 281, 283, 285, 287, 289, 291, 293, 295, 297, 299, 301, 303, 305, 307, 309, 311, 313, 315, 317, 319, 321, 323, 325, 327, 329, 331, 333, 335, 337, 339, 341, 343, 345, 347, 349, 351, 353, 355, 357, 359, 361, 363, 365, 367, 369, 371, 373, 375, 377, 379, 381, 383, 385, 387, 389, 391, 393, 395, 397, 399, 401, 403, 405, 407, 409, 411, 413, 415, 417, 419, 421, 423, 425, 427, 429, 431, 433, 435, 437, 439, 441, 443, 445, 447, 449, 451, 453, 455, 457, 459, 461, 463, 465, 467, 469, 471, 473, 475, 477, 479, 481, 483, 485, 487, 489, 491, 493, 495, 497, 499, 501, 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38783

POLISH WOMEN'S ALLIANCE OF
AMERICA, a corporation,
Appellant,

v.

STEFAN MACHALSKI et al.,
Appellees.

87
APPEAL FROM SUPERIOR
COURT, COOK COUNTY.

287 I.A. 630²

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Polish Women's Alliance of America, as plaintiff, filed a complaint in the superior court to foreclose a mortgage on real estate in Chicago securing the payment of one principal note for \$5,000, executed by Stefan Machalski and wife. The Machalskis had also executed a second mortgage on the premises which was acquired by Wesley Dondalski, who was joined as a defendant in the first mortgage foreclosure proceeding. The matter was heard by a master who found in favor of plaintiff and recommended a decree of foreclosure. Exceptions to the report were filed by Dondalski and upon hearing were sustained by the court and a decree entered dismissing the complaint for want of equity. Plaintiff appeals from that decree, and defendant Dondalski has filed a cross appeal assigning as error the court's refusal to allow him \$100 attorney's fees, under rule 10, subpar. 2, sec. 104 of the Practice act (chap. 110, Ill. State Bar Stats., 1935.)

The mortgage sought to be foreclosed was executed November 16, 1932. The Machalskis had obtained a loan from plaintiff of \$5,000, for which they then executed their principal note maturing

38783

POLISH WOMEN'S ALLIANCE OF
AMERICA, a corporation,

Appellant,

v.

STEFAN MACHALSKI et al.,
Appellees.

APPEAL FROM SUPERIOR

COURT, COOK COUNTY.

237 I.A. 630

MR. JUSTICE FRANK DELIVERED THE OPINION OF THE COURT.

Polish Women's Alliance of America, as plaintiff, filed a complaint in the superior court to foreclose a mortgage on real estate in Chicago securing the payment of one principal note for \$3,000, executed by Stefan Machalski and wife. The Machalskis had also executed a second mortgage on the premises which was acquired by Wesley Bondalski, who was joined as a defendant in the first mortgage foreclosure proceeding. The matter was heard by a master who found in favor of plaintiff and recommended a decree of foreclosure. Exception to the report were filed by Bondalski and upon hearing were sustained by the court and a decree entered dismissing the complaint for want of equity. Plaintiff appeals from that decree, and defendant Bondalski has filed a cross appeal claiming an error the court's refusal to allow him \$100 attorney's fees, under rule 10, chapter 2, sec. 104 of the Practice Act (chap. 110, Ill. State Bar Stat., 1935.)

The mortgage sought to be foreclosed was executed November 18, 1932. The Machalskis had obtained a loan from plaintiff of \$3,000, for which they then executed their principal note maturing

November 16, 1937, and bearing interest at the rate of 6% per annum. The indebtedness was further evidenced by ten interest notes for \$150 each, maturing the 16th day of May and November of each year. The first two installments of interest were paid, but default was made in payment of coupons Nos. 3 and 4, which matured respectively the 16th day of May and November, 1934. The Machalskis also defaulted in the payment of general taxes levied for the years 1931 and 1932.

The premises were subject also to a second mortgage executed by the Machalskis November 17, 1932, securing an indebtedness of \$2,500. Dondalski, owner and holder of this second mortgage, filed a bill to foreclose the mortgage February 2, 1935. The premises were sold under foreclosure decree and a receiver appointed April 13, 1935.

Pursuant to default in payment of the two interest coupons for \$150 each, due March 1 and November 1, 1934, on the first mortgage, and in the payment of general taxes levied for the years 1931 and 1932, plaintiff passed a resolution December 18, 1934, declaring the first mortgage due and payable, and instructed its general counsel to order foreclosure minutes and file a complaint to foreclose the mortgage. Helen Czachorski represented plaintiff, as its general counsel. Nothing was done by her pursuant to the passing of the foregoing resolution, nor by plaintiff, until May 2, 1935, when Edward Fleming, counsel for plaintiff herein, filed the complaint in the superior court. Foreclosure minutes, however, were not ordered until June 19, 1935. Neither Dondalski nor the Machalskis were given notice of the acceleration resolution before the filing of the bill of complaint.

There is considerable evidence indicating that prior to December 18, 1934, negotiations were had with Dondalski by which

November 16, 1937, and bearing interest at the rate of 6% per annum. The indebtedness was further evidenced by ten interest notes for \$150 each, maturing the 15th day of May and November of each year. The first two installments of interest were paid, but default was made in payment of coupons Nos. 3 and 4, which matured respectively the 15th day of May and November, 1934. The Machalakis also defaulted in the payment of general taxes levied for the years 1931 and 1932.

The premises were subject also to a second mortgage executed by the Machalakis November 17, 1932, securing an indebtedness of \$2,500. Dondalaki, owner and holder of this second mortgage, filed a bill to foreclose the mortgage February 2, 1935. The premises were sold under foreclosure decree and a receiver appointed April 15, 1935.

Pursuant to default in payment of the two interest coupons for \$150 each, due March 1 and November 1, 1934, on the first mortgage, and in the payment of general taxes levied for the years 1931 and 1932, plaintiff passed a resolution December 18, 1934, directing the first mortgage be and payable, and instructed its counsel to order for closure minutes and file a complaint to foreclose the mortgage. Helen Gachonaki represented plaintiff, as its counsel. Nothing was done by her pursuant to the passing of the resolution, nor by plaintiff, until May 2, 1935, when plaintiff, counsel for plaintiff herein, filed the complaint in the superior court. Foreclosure minutes, however, were not ordered until June 19, 1935. Neither Dondalaki nor the Machalakis were given notice of the acceleration resolution before the filing of the bill of complaint.

There is considerable evidence indicating that prior to December 18, 1934, negotiations were had with Dondalaki by which

plaintiff sought to acquire his second mortgage. Dondalski called at plaintiff's office November 26, 1934, at the request of Helen Czachorski, and again December 10, 1934. He testified that an offer of \$500 was made for his second mortgage, but he demanded \$1,000. He also testified that at the meeting November 26th plaintiff advised him to foreclose his second mortgage, for the purpose of scaring the Machalskis "into paying up." On the occasion of his second visit to plaintiff's office Dondalski advised Helen Czachorski that he would institute foreclosure proceedings in accordance with her suggestion, and he then placed the matter with his attorney, Maximilian J. St. George. Acting on his attorney's advice, Dondalski and his father called at plaintiff's office and tendered \$300 in currency, which was the total amount of interest then due on the first mortgage, at the same time advising plaintiff that proceedings to foreclose the second mortgage were being instituted. Dondalski testified that the tender was refused. He then made the same tender to plaintiff's attorney, and it was again refused. A renewal of the tender was again made February 26, 1935. There followed several letters by St. George, wherein he advised plaintiff and plaintiff's attorney that \$300 had been left with him to be applied on the two interest notes due on the first mortgage which he was ready to pay over whenever plaintiff indicated its willingness to accept this sum. After the bill to foreclose the second mortgage was filed, Dondalski paid the taxes then due on the property, so that there was never any sum owing except the \$300 due on two interest coupons. At the hearing before the master, St. George testified that he had received \$300 from Dondalski which he still had in his possession and desired to turn over to plaintiff, and that he wished to add an additional \$150 to cover the interest that became

plaintiff sought to acquire his second mortgage. Defendant called at plaintiff's office November 26, 1934, at the request of Helen Gachorowski, and again December 10, 1934. He testified that an offer of \$500 was made for his second mortgage, but he demanded \$1,000. He also testified that at the meeting November 26th plaintiff advised him to foreclose his second mortgage, for the purpose of securing the "backlash" into "paying up." On the occasion of his second visit to plaintiff's office Defendant advised Helen Gachorowski that he would institute foreclosure proceedings in accordance with her suggestion, and he then placed the matter with his attorney, Maximilian J. St. George. Acting on his attorney's advice, Defendant and his father called at plaintiff's office and tendered \$300 in currency, which was the total amount of interest then due on the first mortgage, at the same time advising plaintiff that proceedings to foreclose the second mortgage were being instituted. Defendant testified that the tender was refused. He then made the same tender to plaintiff's attorney, and it was again refused. A renewal of the tender was again made February 26, 1935. There followed several letters by St. George, wherein he advised plaintiff and plaintiff's attorney that \$300 had been left with him to be applied on the two interest notes due on the first mortgage which he was ready to pay over whenever plaintiff indicated his willingness to accept this sum. After the bill to foreclose the second mortgage was filed, Defendant paid the taxes then due on the property, so that there was never any lien except the \$300 due on two interest coupons. At the hearing before the master, St. George testified that he had received \$300 from Defendant which he still had in his possession and desired to turn over to plaintiff, and that he wished to add an additional \$150 to cover the interest that became

due during the pendency of the hearing. This tender was again refused. There is of course a denial on the part of plaintiff and its representatives and attorneys that these various tenders were made, but St. George's communications which speak of the tenders, and one of which states that "at any time you care to accept the interest money, let me know, and I shall see that you are paid," are uncontradicted, and none of these communications was ever answered. The master made the following finding with reference to these various tenders:

"Defendant, Wesley Dondalski, very urgently contends that some time after December 18th, A. D. 1934, he properly and lawfully tendered the sum of Three Hundred (\$300.00) Dollars to plaintiff on account of the indebtedness secured by said Trust Deed and that by reason of said tender the foreclosure herein was improperly commenced and prosecuted. The evidence with reference to the tender is not entirely uncontradicted, but in all events it is undisputed that if made it was made long after the acceleration of the note by the plaintiff through a resolution duly passed by its Board of Directors on December 18th, 1934."

We are convinced from an examination of the record that negotiations were had with Dondalski prior to December 18, 1934, in which plaintiff sought to acquire his second mortgage, and that during the conversations had with Dondalski by plaintiff's representatives and attorneys a tender was made of the amount due on the defaulted coupons preceding the acceleration resolution of December 18th. Dondalski testified that in the latter part of November, 1934, he received a letter from the Polish Women's Alliance and called on Mrs. Czachorski who advised him to start foreclosure proceedings on the second mortgage; that he again called at plaintiff's office December 10th with his father, proceeded to the cashier's window and stated to the person in attendance that he desired to pay the interest on the first mortgage, stating his name and his interest in the proceeding; that he desired to foreclose the second mortgage and wanted all bills paid before filing his complaint; that his tender was refused by the person in charge, with the remark "we have

due during the pendency of the hearing. This tender was again refused. There is of course a denial on the part of plaintiff and its representatives and attorneys that these various tenders were made, but Mr. George's communications which speak of the tenders, and one of which states that "at any time you care to accept the interest money, let me know, and I shall see that you are paid," are uncontroverted, and none of these communications was ever answered. The master made the following finding with reference to these various tenders:

"Defendant, Wesley Bondalski, very urgently contends that some time after December 18th, A. D. 1934, he properly and lawfully tendered the sum of three hundred (\$300.00) Dollars to plaintiff on account of the indebtedness secured by said Bond and that by reason of said tender the indebtedness herein was properly commenced and prosecuted. The evidence with reference to the tender is not entirely uncontroverted, but in all events it is undisputed that it was made some time after the acceleration of the note by the plaintiff through a resolution duly passed by its Board of Directors on December 18th, 1934."

We are convinced from an examination of the record that negotiations were had with Bondalski prior to December 18, 1934, in which plaintiff sought to secure his second mortgage, and that during the conversations had with Bondalski by plaintiff's representatives and attorneys a tender was made of the amount due on the defaulted coupons preceding the acceleration resolution of December 18th, 1934. Bondalski testified that in the latter part of November, 1934, he received a letter from the Polish Women's Alliance and called on Mrs. Gachowski who advised him to start foreclosure proceedings on the second mortgage; that he again called at plaintiff's office December 10th with his father, proceeded to the cashier's window and stated to the person in attendance that he desired to pay the interest on the first mortgage, stating his name and his interest in the proceeding; that he desired to foreclose the second mortgage and wanted all bills paid before filing his complaint; that his tender was refused by the person in charge, with the remark "we have

got nothing to do with you;" that he then went to Mrs. Czachorski's office and took with him the \$300 in U. S. currency and told her that he desired to pay up the defaulted interest; that Mrs. Czachorski said, "Well, I have got nothing to do with it. The board of directors, they do not want to go with you. They go with Machalski. They want to foreclose." This and other evidence, including St. George's letters, clearly indicate that Dondalski at all times desired to make good the defaults on the first mortgage. He had been advised by plaintiff to institute foreclosure proceedings, and before filing his complaint desired to make good Machalski's defaults on the first mortgage. This desire was evidently prompted by the undenied negotiations had with plaintiff by which it sought to purchase his second mortgage.

In that situation Dondalski, who seeks to sustain the decree of the superior court dismissing the complaint for want of equity, takes the position that plaintiff should have allowed him to pay up the defaulted interest before the acceleration resolution was passed December 18, 1934, and that its refusal so to do would make it inequitable to permit plaintiff to foreclose the first mortgage. Plaintiff does not contend that Dondalski had no right to make good the Machalski defaults in order to preserve the lien of his second mortgage; it simply denies that he offered to do this. From a careful examination of the record and all the circumstances attending the negotiations between the parties, we are convinced that Dondalski made every reasonable effort to pay up the defaults on the first mortgage, but was prevented from doing so for some undisclosed reason which can be surmised only from the undisputed testimony that plaintiff was at the same time seeking to acquire whatever interest Dondalski had in the second mortgage. There is no other explanation for the fact that the acceleration resolution was passed

got nothing to do with you," that he then went to Mrs. Gashchinsk's office and took with him the \$500 in U. S. currency and told her that he desired to pay up the defaulted interest; that Mrs. Gashchinsk said, "Well, I have got nothing to do with it. The board of directors, they do not want to go with you. They go with Machalski. They want to foreclose." This and other evidence, including George's letters, clearly indicate that Bondalski at all times desired to make good the default on the first mortgage. He had been advised by plaintiff to institute foreclosure proceedings, and before filing his complaint desired to make good Machalski's default on the first mortgage. This desire was evidently prompted by the undesired negotiations had with plaintiff by which it sought to purchase the second mortgage. In that situation Bondalski, who seeks to maintain the decree of the superior court dissolving the complaint for want of equity, takes the position that plaintiff should have allowed him to pay up the defaulted interest before the acceleration resolution was passed December 19, 1934, and that its refusal so to do would make it inequitable to permit plaintiff to foreclose the first mortgage. Plaintiff does not contend that Bondalski had no right to make good the Machalski default in order to preserve the lien of his second mortgage; it simply denies that he offered to do this. From a careful examination of the record and all the circumstances attending the negotiations between the parties, we are convinced that Bondalski made every reasonable effort to pay up the default on the first mortgage, but was prevented from doing so for some well-closed reason which can be ascertained only from the undisputed testimony that plaintiff was at the same time seeking to acquire the first interest Bondalski had in the second mortgage. There is no other explanation for the fact that the acceleration resolution was passed

December 18, 1934, which was six months after default in the payment of coupons Nos. 3 and 4, and that the filing of a bill of complaint pursuant to the resolution was withheld until May 2, 1935. Neither Dondalski nor the Machalskis knew of the acceleration resolution, and while the negotiations between plaintiff and Dondalski were going on he was not apprised of the election of plaintiff to accelerate the entire debt and had no notice of the impending foreclosure until the complaint was actually filed. During the several months preceding the filing of the bill Dondalski and his attorney, St. George, were in constant touch with plaintiff and its representatives and evidently sought in various ways to pay the defaulted debt and were at the same time negotiating for the sale of the second mortgage to plaintiff. To sustain the decree of foreclosure under these circumstances would be inequitable. The only debt due when the complaint was filed were two interest coupons for \$150 each and some \$129 in back taxes. Dondalski paid the back taxes and was apparently ready at all times to pay the \$300 due as interest, and even as late as the master's hearing he renewed the tender and offered to pay an additional \$150 on a coupon that had matured during the pendency of the cause. We fail to see any necessity or justification for the filing of the foreclosure proceeding under the circumstances. Should we permit the foreclosure decree to stand defendant Dondalski would be in the position of having expended the costs of foreclosing the second mortgage, including filing fees, master's and attorneys' fees, and the sums paid on account of taxes, all at the instigation of plaintiff, who advised him to foreclose, without any chance of recovering these outlays. In addition thereto his second mortgage lien would be substantially destroyed by reason of the foreclosure of the first mortgage. Under the circumstances, the chancellor, in the exercise

December 18, 1934, which was six months after default in the payment of coupon Nos. 3 and 4, and that the filing of a bill of complaint pursuant to the resolution was withheld until May 1, 1935. Neither Bondelmi nor the Wachusett knew of the resolution, and while the negotiations between plaintiff and defendant were going on he was not apprised of the election of plaintiff to accelerate the entire debt and had no notice of the impending foreclosure until the complaint was actually filed. During the several months preceding the filing of the bill Bondelmi and his attorney, Mr. George, were in constant touch with plaintiff and its representatives and evidently sought in various ways to pay the defaulted debt and were at the same time negotiating for the sale of the second mortgage to plaintiff. To sustain the decree of foreclosure under these circumstances would be inequitable. The only debt due when the complaint was filed were two interest coupons for \$150 each and some 192 in back taxes. Bondelmi paid the back taxes and was apparently ready at all times to pay the \$300 due as interest, and even as late as the master's hearing he renewed the tender and offered to pay an additional 150 on a coupon that had matured during the pendency of the cause. He failed to do so, necessarily or justification for the filing of the foreclosure proceeding under the circumstances. Should we permit the foreclosure decree to stand defendant Bondelmi would be in the position of having expended the costs of foreclosing the second mortgage, including filing fees, master's and attorney's fees, and the same paid on account of taxes, all at the instigation of plaintiff, and yet placed him to foreclose, without any chance of recovering same out of him. In addition there is his second mortgage lien would be substantially destroyed by reason of the foreclosure of the first mortgage. Under the circumstances, the chancellor, in the exercise

of his equitable powers, properly dismissed the complaint for want of equity.

Dondalski's cross appeal is founded on the section of the civil practice act heretofore cited, which provides that any party may by notice in writing call on the other party to admit for the purposes of the cause any specific fact or facts mentioned in the written notice "which can be fairly admitted without qualification or explanation, as stated therein," and that in case of the refusal or neglect of the opposing party to admit such fact the court may allow expenses incurred in proving such fact, including reasonable attorneys' fees. Inasmuch as the question of tender was a controverted issue we do not think the statute is applicable thereto, and the cross appeal is therefore dismissed.

Other points are urged to sustain the order of dismissal, but in view of the conclusions here reached it will be unnecessary to discuss them. The order of the superior court is affirmed.

AFFIRMED.

Sullivan, P. J., and Scanlan, J., concur.

of his equitable powers, properly dismissed the complaint for want of equity.

Dondanville's cross appeal is founded on the section of the civil practice act heretofore cited, which provides that any party may by notice in writing call on the other party to admit for the purposes of the case any specific fact or fact mentioned in the written notice "which can be fairly admitted without qualification or explanation, or stated therein," and that in case of the refusal or neglect of the opposing party

to admit such fact the court may allow expenses incurred in

proving such fact, including reasonable attorney's fees. Inasmuch as the question of tender was a controverted issue we do not think the statute is applicable thereto, and the cross appeal is therefore dismissed.

Other points are urged to sustain the order of dismissal, but in view of the conclusions here reached it will be unnecessary to discuss them. The order of the superior court is affirmed.

WILLIAM.

Sullivan, P. J., and Roselman, J., concur.

38809

UNDERWOOD VENEER COMPANY,
a corporation,

Appellee,

v.

PAPER MACHINERY COMPANY,
a corporation,

Appellant.

APPEAL FROM CIRCUIT COURT,

COOK COUNTY.

287 I.A. 630³

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action in assumpsit to recover damages alleged to have been sustained by reason of defendant's failure to fulfill a contract for the sale and delivery of certain machinery. Trial was had before the court without a jury resulting in findings and judgment in favor of plaintiff for \$1,807 and costs. Defendant appeals.

Plaintiff's case was submitted on a second amended first count and the common counts, supported by an affidavit of claim which alleged that by a certain instrument in writing plaintiff bought of defendant and defendant sold to plaintiff one Sheridan 75" veneer cutter, for which plaintiff agreed to pay the sum of \$1,250; that notwithstanding its contract with plaintiff defendant would not and did not deliver the cutter, by reason whereof plaintiff was compelled to and did go into the open market and buy a Sheridan veneer cutter at the best price obtainable and of the same kind and quality, which was \$1,872 in excess of the price for which plaintiff had previously bought same from defendant. Attached to the affidavit of claim was a copy of the instrument sued on.

Defendant filed a plea of the general issue and an affidavit

38809

LEWIS & CLARK COMPANY,
a corporation,

Appellee,

v.

HARVEY LAMARCA COMPANY,
a corporation,

Appellant.

DOCK COUNTY.

APPEAL FROM CIRCUIT COURT,

38809 I.A. 680

MR. JUSTICE BRIDGES DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action in assumpsit to recover damages alleged to have been sustained by reason of defendant's failure to fulfill a contract for the sale and delivery of certain machinery. Trial was had before the court without a jury resulting in findings and judgment in favor of plaintiff for \$1,800 and costs. Defendant appeals.

Plaintiff's case was submitted on a second amended first count and the common counts, supported by an affidavit of claim which alleged that by a certain instrument in writing plaintiff bought of defendant and defendant sold to plaintiff one "Hudson 75" veneer cutter, for which plaintiff agreed to pay the sum of \$1,800; that notwithstanding its contract with plaintiff defendant would not and did not deliver the cutter, by reason whereof plaintiff was compelled to and did go into the open market and buy a Hudson veneer cutter at the best price obtainable and of the same kind and quality, which ran \$1,825 in excess of the price for which plaintiff had previously bought same from defendant. Attached to the affidavit of claim was a copy of the instrument sued on. Defendant filed a plea of the general issue and an affidavit

of merits specifically denying that "plaintiff bought and the defendant sold" such veneer cutter, and averring that the "instrument sued on was subject to acceptance at the main office, 549 W. Washington street, Chicago, Illinois; that at no time did the defendant accept said order or offer at the main office aforesaid," and that plaintiff did not sustain damages as alleged.

Defendant is engaged in the machinery business in Chicago and A. L. Fader is its president. In the spring of 1933 plaintiff, a Wisconsin corporation, located at Wausau, Wisconsin, was in the market for a veneer cutter, to be used in the manufacture of a new line of plywood panel products. George A. Vehlow, plaintiff's sales manager, was instructed by its president, O. C. Lemke, to locate a cutter that would meet the requirements necessitated by the new line of products, and in this connection he met A. L. Fader, defendant's president. As a result of this contact a 75" Sheridan cutter was located at Kokomo, Indiana, at the plant of the Davis Industries, then in liquidation. April 13, 1933, defendant offered the machine in question to plaintiff, together with other wood working machinery, for \$1,500, f.o.b. cars, Kokomo, Indiana. About a week prior thereto the Noble Machine Co., of Fort Wayne, Indiana, had offered the identical cutter to plaintiff for \$1,750, f.o.b. shipping point. April 18, 1933, A. L. Fader, in the course of a selling trip, called on plaintiff at Wausau, Wisconsin, and after considerable bargaining the following instrument, upon which plaintiff predicates its action, was signed by plaintiff:

"Order No. _____, dated at Wausau, Wis. 4/18/33.
The Fader Machinery Company, Inc.
549 West Washington Boulevard,
Chicago, Ills.

(This order is not subject to cancellation)

Subject to strikes, accidents and other delays beyond your control, please ship in good order the following machinery

of merits specifically denying that "plaintiff bought and the defendant sold" such veneer cutter, and averring that the "instrument used on was subject to acceptance at the main office, 549 N. Washington Street, Chicago, Illinois; that at no time did the defendant accept said order or offer at the said office above- said," and that plaintiff did not sustain damages as alleged.

Defendant is engaged in the machinery business in Illinois and A. L. Rader is its president. In the spring of 1933 plaintiff, a Wisconsin corporation, located at Janesville, Wisconsin, was in the market for a veneer cutter, to be used in the manufacture of a new line of plywood panel products. George A. Voth, plaintiff's sales manager, was instructed by its president, G. C. Burke, to locate a cutter that would meet the requirements necessitated by the new line of products, and in this connection he met A. L. Rader, defendant's president. As a result of this contact a "75" Rader cutter was located at Kokomo, Indiana, at the plant of the Davis Industries, then in liquidation. April 13, 1933, defendant offered the machine in question to plaintiff, together with other wood working machinery, for \$1,500, f.o.b. cars, Kokomo, Indiana. About a week prior thereto the Noble Machine Co., of Fort Wayne, Indiana, had offered the identical cutter to plaintiff for \$1,750, f.o.b. shipping point. April 13, 1933, A. L. Rader, in the course of a selling trip, called on plaintiff at Janesville, Wisconsin, and after considerable bargaining the following instrument, upon which plaintiff purchased its action, was signed by plaintiff:

"Order No. _____, dated at _____, Wis., 4/13/33.
The Rader Machinery Company, Inc.
549 East Washington Boulevard,
Chicago, Ills.

(This order is not subject to cash collection)
Subject to studies, conditions and other delays beyond
your control, please ship in good order the following machinery

delivered F.O.B. Wausau, Wis.

1 - Sheridan 75-inch veneer Cutter complete with standard equipment including 1 extra knife and 5 H. P. 220 volt, 60 cycle, 3 phase A. C. Motor and starter - - - - - \$1,250

30- 24-inch x 48 inch Factory Trucks complete with stakes, each \$2.50 - - - - - 75

for which we agree to pay upon arrival complete and in good condition after date of shipment Thirteen Hundred & Twenty-five & no/100 Dollars with exchange.

The purchaser agrees to make settlement within thirty days after date of shipment and to then evidence all payments due at a later date by notes bearing date of shipment and interest. The Purchaser further agrees that notes, drafts, or acceptances given are not to be considered as payments until they are paid.

In case payment is divided, to be made as follows:

Ship to Underwood Veneer Co.
At Wausau, Wis.
Via Best Route
When When instructed.

It is agreed that title to the property mentioned above shall remain in the consignor until fully paid for in cash, and that in case of rejection, consignee will promptly deliver it to consignor F.O.B. point of shipment, and that this contract is not modified or added to by any agreement not expressly stated herein, and that a retention of the property forwarded, after thirty days after date of shipment, shall constitute a trial and acceptance, be a conclusive admission of the truth of all representations made by or for the consignor and void all its contracts of warranty express or implied. It is further agreed that the purchaser shall keep the property fully insured for the benefit of The Fader Machinery Company, Inc., having policy indorsed 'payable to the Fader Machinery Company, Inc., as its interests may appear,' and that said machinery shall not become a fixture to any realty on account of being annexed thereto.

Underwood Veneer Co.,
By O. C. Lemke,
Pres.

Sold by
A. L. Fader,
Salesman for
The Fader Machinery Company, Inc.,
Subject to acceptance at the Main office,
549 West Washington Boulevard,
Chicago, Ill."

Fader testified that before the foregoing order was signed he told Mr. Lemke that "we shall try to put this over with our principals." This statement was corroborated by Charles A. Green, vice president and treasurer of the Fader Machinery Co., who stated that defendant

delivered I. B. Johnson, Inc.

1 - Hamilton 75-inch vertical engine with 10-horsepower
motor including 1 extra unit and 3 H. P. 220 volts, 60 cycles,
3 phase A. C. motor and starter

30 - 24-inch x 48 inch Victory Truck complete with motor,
each \$2.50

for which we agree to pay upon arrival complete and in good con-
dition after date of shipment Thirteen Hundred & Twenty-five
\$ no/100 dollars with exchange.

The purchaser agrees to make satisfactory title in thirty
days after date of shipment and to then evidence all payments
due at a later date by notes bearing date of shipment and
interest. The purchaser further agrees that notes, drafts, or
acceptances given or not to be considered as payments until
they are paid.

In case payment is divided, to be made as follows:

Ship to Underwood Veneer Co.
At
Best Route
When instructed.

It is agreed that title to the property mentioned above shall re-
main in the consignor until fully paid for in cash, and that in
case of rejection, consignor will promptly deliver it to consignee
T.O.B. point of shipment, and that this contract is not modified
or added to by any agreement not expressly stated herein, and that
a retention of the property forwarded, after thirty days after date
of shipment, shall constitute a title and acceptance, as a con-
clusive admission of the truth of all representations made by or
for the consignor and void all its contracts of warranty except as
expressly implied. It is further agreed that the purchaser shall keep
the property fully insured for the benefit of the Under Machinery
Company, Inc., having policy insured payable to the Under Machinery
Company, Inc., as its interests may appear, and that said machinery
shall not become a fixture to any realty on account of being annexed
thereto.

Underwood Veneer Co.,
By O. C. Jenke,
Pres.

Sold by
A. B. Vaber,
Salesman for
The Under Machinery Company, Inc.,
subject to acceptance at the main office,
549 East Washington Boulevard,
Chicago, Ill.

Vaber testified that before the foregoing order was signed he told
Mr. Jenke that "we shall try to put this over with our principals."
This statement was corroborated by Charles A. Green, vice president
and treasurer of the Under Machinery Co., who stated that defendant

was induced to undertake the submission of plaintiff's offer through the intimation of plaintiff's president that he himself would go to Kokomo and select additional equipment to make up a carload shipment.

April 25, 1933, Fader telegraphed plaintiff that his principal would not permit shipment except on the usual used machinery terms of one-third with orders, balance draft attached to bill of lading, f.o.b. Kokomo. This telegram was followed by a letter to the same effect. The following day plaintiff wrote defendant that its president, Mr. Lemke, would be in Chicago within a week's time and take up with defendant personally the matter of the Sheridan veneer cutter. However, Mr. Lemke never called on defendant to discuss the matter. May 2, 1933, the Noble Machine Co. offered an 80" cutter to plaintiff for \$1,750. About a week later, May 9, plaintiff wrote defendant to arrange to forward the cutter, stating that the matter had been delayed, subject to the "writer's visit to the factory at Kokomo," and the selection of other machinery in addition to the cutter.

Negotiations between the parties were thereafter held in abeyance until June 8, 1933, when defendant received a letter from plaintiff's attorney, commenting on the correspondence had between the parties, and stating that plaintiff refused to change the contract. Plaintiff evidently made no further effort to buy the identical cutter from the Noble Machine Co., or a like machine elsewhere, until July 27, 1933, when it purchased direct from the manufacturer a new 75" veneer cutter for \$2,800. In addition to the purchase price plaintiff paid the freight charges from New York to Wausau, amounting to \$204, and August 3, 1933, purchased a new motor and accessories for \$118. Plaintiff thus expended \$2,800 for the cutter, \$204 freight, \$118 for a new motor, aggregating \$3,122. From this total there was deducted the contract price of

was induced to undertake the submission of Plaintiff's offer through the institution of Plaintiff's President that he himself would go to Kokomo and select additional equipment to make up a loaded shipment.

April 25, 1933, Weber telegraphed Plaintiff that this principal would not permit shipment except on the usual trade machinery terms of one-third with orders, balance draft attached to bill of lading, F.O.B. Kokomo. This telegram was followed by a letter to the same effect. The following day Plaintiff wrote defendant that its president, Mr. Burke, would be in Chicago within a week's time and take up with defendant personally the matter of the Sheridan venter cutter. However, Mr. Burke never called on defendant to discuss the matter. May 2, 1933, the Noble Machine Co. offered an 80" cutter to Plaintiff for \$1,750. About a week later, May 9, Plaintiff wrote defendant to arrange to forward the cutter, stating that the matter had been delayed, subject to the "cutter's visit to the factory at Kokomo," and the collection of other machinery in addition to the cutter.

Negotiations between the parties were thereafter held in advance until June 2, 1933, when defendant received a letter from Plaintiff's attorney, commenting on the correspondence had between the parties, and stating that Plaintiff refused to change the contract. Plaintiff evidently made no further effort to buy the identical cutter from the Noble Machine Co., or a like machine elsewhere, until July 27, 1933, when it purchased direct from the manufacturer a new 75" venter cutter for \$2,800. In addition to the purchase price Plaintiff paid the freight charges from New York to New Haven, amounting to \$204, and amount \$2,193, purchased a new motor and accessories for \$118. Plaintiff then expended \$2,800 for the cutter, \$204 freight, \$118 for a new motor, aggregating \$5,822. From that total there was deducted the contract price of

\$1,250, leaving \$1,872, from which the court deducted the freight charges that would have been incurred in shipping the old cutter to Wausau, leaving a balance of \$1,807, which was assessed as plaintiff's damages. Judgment was entered for that amount and costs.

Defendant interposed a twofold theory of defense (1) that there was no contract, and (2) that if there was a contract and a breach thereof the court erroneously determined the measure of damages. With reference to the first proposition it is urged that the written instrument sued on was merely a proposal, or an offer to buy, and subject to acceptance by defendant at its main office in Chicago; that it was at best a unilateral contract which would not be binding on the seller until it was accepted; that it never was accepted by defendant and therefore never ripened into a binding contract between the parties. To support this contention defendant relies on certain fundamental rules of contract and decisions holding that the burden of proof to establish a contract of purchase and sale is on the party seeking to enforce it; that an offer to buy is not binding until accepted by the seller; that a contract by which one party agrees to buy, but the other does not agree to sell, is unilateral, and cannot be enforced; and that there can be no bargain unless an offer is accepted unconditionally. In arguing these various propositions defendant characterizes the written instrument upon which plaintiff's claim is based as a mere memorandum of terms and conditions upon which plaintiff had invited defendant to deal with it, and points out that the form used was obviously not appropriate, either as an expression of the parties' intentions or their agreement, for the following reasons: The written instrument contains provisions in the printed portions thereof which defendant's counsel says are utterly inconsistent with any theory of final purchase and sale. In one portion of the

1,250, leaving 1,375, from which the court deducted the plaintiff's charges that would have been incurred in selling the old cutter to Hansen, leaving a balance of 1,307, which was awarded as plaintiff's damages. Judgment was entered for that amount and costs.

Defendant introduced a two-fold theory of defense (1) that there was no contract, and (2) that if there was a contract and a breach thereof the court erroneously determined the measure of damages. With reference to the first proposition it is urged that the written instrument used on was merely a proposal, or an offer to buy, and subject to acceptance by defendant at its main office in Chicago; that it was at best a unilateral contract which could not be binding on the seller until it was accepted; that it never was accepted by defendant and therefore never ripened into a binding contract between the parties. To support this contention defendant relies on certain fundamental rules of contract and decisions holding that the burden of proof to establish a contract of purchase and sale is on the party seeking to enforce it; that an offer to buy is not binding until accepted by the seller; that a contract by which one party agrees to buy, but the other does not agree to sell, is unilateral, and cannot be enforced; and that there can be no bargain unless an offer is accepted unconditionally. In arguing these various propositions, defendant misrepresented the written instrument upon which plaintiff's claim is based as a mere memorandum of terms and conditions upon which plaintiff had invited defendant to deal with it, and pointed out that the form used was obviously not appropriate, either as an expression of the parties' intentions or in its language, for the following reasons: The written instrument contained provisions in the printed portions thereof which defendant's counsel says are not in the instrument with any copy of final purchase and sale. In one portion of the

document plaintiff agrees to pay on delivery in good condition; in another it provides that the purchaser agrees to make settlement within thirty days after date of shipment, and then, to evidence all payment due defendant at a later date, by notes bearing date of shipment and interest. It is also pointed out that the instrument provides for rejection by consignee, and that a retention of the property for more than thirty days after shipment shall constitute a trial and acceptance and be a conclusive admission of the truth of all representations made. It is difficult, indeed, to reconcile these various provisions with plaintiff's theory that this transaction constituted a completed purchase and sale.

At the close of plaintiff's case the trial court was evidently inclined to hold with defendant that the document was simply a unilateral contract, but after considerable discussion the court adopted the theory that A. L. Fader, as president of defendant company, orally accepted the proposal and thereby complied with the provision in the written instrument which made the sale "subject to acceptance at the main office, 549 West Washington Blvd., Chicago, Illinois." We think this conclusion is not warranted by the record. Subsequent negotiations between the parties, as disclosed by their correspondence, indicates that there was never an acceptance by defendant. Plaintiff seeks to minimize the provision in the written instrument which makes the proposal "subject to acceptance, etc.," by arguing that this was no part of the contract itself but merely a printed memorandum following plaintiff's signature, and therefore not binding. We are not impressed with that contention, however, for the following reasons: Defendant was not the owner of the Sheridan veneer cutter. That piece of machinery was located in the factory of Davis Industries, Kokomo, Indiana, which was then in liquidation, and it appears from the evidence that

document plaintiff agrees to pay on delivery in good condition; in another it provides that the purchaser agrees to make settlement within thirty days after date of shipment, and then, to evidence all payment on delivery at a later date, by notes bearing date of shipment and interest. It is also pointed out that the instrument provides for rejection by consignee, and that a retention of the property for more than thirty days after shipment shall constitute a trial and acceptance and be a conclusive admission of the truth of all representations made. It is difficult, indeed, to reconcile these various provisions with plaintiff's theory that this transaction constituted a completed purchase and sale.

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at least two concerns were trying to dispose of it, the Noble Machine Co., at Kokomo, which had quoted a price thereon to plaintiff, and the Fader Machine Co., defendant. Moreover, defendant had other salesmen, any one of whom might have disposed of the machine pending these negotiations. Under the circumstances it was essential for the protection of defendant to ascertain if the machine had not been previously sold pending the negotiations with plaintiff at Wausau, and it was not unreasonable for defendant to protect itself by the condition inserted in the written document against any liability that might arise from the sale of the machine by Noble Machine Co. or one of defendant's other salesmen pending the negotiations.

The written document also contains the memorandum "Sold by A. L. Fader, Salesman for the Fader Machinery Co., Inc.," and counsel for plaintiff argue that this indicates a completed sale. Evidently the court also entertained that view, as indicated by an expression that the words were inducive, if not determinative, of the question whether or not the instrument represented a completed sale. A similar situation arose in the case of Smith v. Weaver, 90 Ill. 392, wherein defendant signed the following written memorandum contained in plaintiff's firm books: "Sold this day, N. Weaver, a bill of lumber, to complete a house for himself, * * *." With reference to this memorandum the court said that it was not a contract of sale but a mere offer made by the defendant to let plaintiff have lumber at certain specified prices which might be revoked at any time before delivery or at least at any time before the offer had been accepted by plaintiff. "It is true, the word 'sold' is used in the instrument; but, then, the whole instrument must be construed together. When this is done, it is plain there is no valid contract to bind anyone." In Bayfield v. Defenbacher,

it is at least to be assumed that the defendant was trying to dispose of it, the Noble Machine Co., at London, which had quoted a price thereon to plaintiff, and the latter Machine Co., defendant. Moreover, defendant had other salesmen, any one of whom might have disposed of the machine pending these negotiations. Under the circumstances it was essential for the protection of defendant to ascertain if the machine had not been provisionally sold pending the negotiations with plaintiff at London, and it was not unreasonable for defendant to protect itself by the condition inserted in the written document against any liability that might arise from the sale of the machine by Noble Machine Co. or one of defendant's other salesmen pending the negotiations.

The written document also contains the memorandum "sold by A. E. Fisher, Salesman for the Fisher Machine Co., Inc.," and counsel for plaintiff argue that this indicates a completed sale. Evidently the court also entertained that view, as indicated by an expression that the words were inductive, if not determinative, of the question whether or not the instrument represented a completed sale. A similar situation arose in the case of Smith v. Weaver, 93 Ill. 302, wherein defendant signed the following written memorandum contained in plaintiff's firm books: "Sold this day, 1900, a bill of lumber, to complete a house for himself, * * *". With reference to this memorandum the court said that it was not a contract of sale but a mere offer made by the defendant to let plaintiff have lumber at certain specified prices which might be revoked at any time before delivery or at least at any time before the offer had been accepted by plaintiff. "It is true, the word 'sold' is used in the instrument; but, then, the whole instrument must be construed together. When this is done, it is plain there is no valid contract to bind anyone." In Wells v. Wells, 100 Ill. 400.

266 Ill. App. 385, we held under circumstances that were analogous in principle that words similar in effect to "sold by" constituted a mere attempt to effect a sale, and cited Smith v. Weaver, supra, in support of the conclusion there reached.

The correspondence in evidence indicates that there was always some uncertainty about the consummation of this transaction. April 26, 1933, Fader telegraphed plaintiff that his principal would not permit shipment except on the usual used machinery terms of one-third payment with orders, balance draft attached to bill of lading, f.o.b. Kokomo, and this telegram was followed by a letter to the same effect, which plaintiff answered by stating that its president, Mr. Lemke, would be in Chicago within a week's time to take up personally with defendant the matter of the cutter. Mr. Lemke never called on defendant to discuss the matter. In June, 1933, plaintiff's attorneys advised defendant that the matter had been placed with them for attention. This correspondence apparently terminated the negotiations and resulted in the purchase of the new machine by plaintiff. After careful consideration we have reached the conclusion that the instrument sued on cannot be construed as a binding contract of purchase and sale, but is, as the trial court in the first instance characterized it, a unilateral agreement subject to acceptance by defendant; that defendant never did accept the proposal unconditionally, principally because of differences as ^{to} terms of payment, and that as a result of these differences defendant declined to accept the offer or proposal and no agreement was reached upon which an action could be predicated. This is substantiated by Lemke's letter to Fader of April 26, and the events that followed.

The remaining question relates to the measure of damages.

See Ill. app. 388, we have under consideration the fact that in principle that would result in an effort to "hold" the defendant were attempt to effect a sale, and other Smith v. Lumber, Smith, in support of the conclusion there reached.

The correspondence in evidence indicates that there was always some uncertainty about the consummation of this transaction. April 26, 1933, Feder telegraphed plaintiff that his principal would not permit shipment except on the usual trade preliminary terms of one-third payment with orders, balance not attached to bill of lading, i. e. J. J. Komo, and this telegram was followed by a letter to the same effect, which plaintiff answered by stating that its president, Mr. Lemke, would be in Chicago within a week's time to take up personally with defendant the matter of the order. Mr. Lemke never called on defendant to discuss the matter. In June, 1933, plaintiff's attorneys advised defendant that the matter had been placed with them for attention. This correspondence apparently terminated the negotiation and resulted in the purchase of the machine by plaintiff. After careful consideration we have reached the conclusion that the instrument such as cannot be construed as a binding contract of purchase and sale, but as, as the trial court in the first instance characterized it, a unilateral agreement subject to acceptance by defendant; that defendant never did accept the proposal unconditionally, principally because of differences ^{to} terms of payment, and that as a result of these differences defendant declined to accept the offer or proposal and no agreement was reached upon which an action could be predicated. This is substantiated by Lemke's letter to Feder of April 26, and the events that followed.

The remaining question relates to the nature of Lemke's

In view of our conclusion as to the first defense, this question becomes unimportant. It is clear, however, that plaintiff utterly failed to prove damages under the provisions of paragraphs 2 and 3, sec. 67, chap. 121a, Uniform Sales act (Illinois State Bar Stats., 1935), and in accordance with the well recognized rules governing cases of this character. It relies on the assertion that there was only one used machine to be had and that one had already been sold to plaintiff. This is not borne out by the evidence. There was no effort made to ascertain whether there were other machines available or the market value of a like article, and without such proof the court had no basis to afford an assessment of damages. To permit recovery on the difference between the value of a new cutter and the quoted price of the one in question, without specific proof that no other used cutter could be purchased, was error. It follows from what we have said that the judgment of the circuit court should be reversed, and it is so ordered.

REVERSED.

Sullivan, P. J., and Scanlan, J., concur.

In view of our conclusion as to the first defense, the question becomes unimportant. It is clear, however, that Plaintiff utterly failed to prove damages under the provisions of paragraph 1 and 2, sec. 67, chap. 131a, Uniform Sales Act (Illinois Code Ann. 1935), and in accordance with the well recognized rules governing cases of this character. It relied on the fact that there was only one used machine to be had and that one had already been sold to Plaintiff. This is not borne out by the evidence. There was no effort made to ascertain whether there were other machines available on the market or the value of a like article, and without such proof the court had no basis to afford an assessment of damages. To permit recovery on the difference between the value of a new cutter and the proved price of the one in question, without specific proof that no other used cutter could be purchased, was error. It follows from what we have said that the judgment of the circuit court should be reversed, and it is so ordered.

REVEREND.

GILFILLAN, J., and GILFILLAN, J., concur.

38865

ELMER C. HUEBNER,
Appellee,

v.

GOLDBLATT BROS., Inc.,
and HENRY MERIK,
Appellants.

APPEAL FROM CIRCUIT COURT,
COOK COUNTY.

287 I.A. 630⁴

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Plaintiff was injured by a tractor owned by Goldblatt Bros., Inc., and driven by its employee, Henry Merik. In an action on the case brought by plaintiff to recover damages for the injuries sustained, the jury returned a verdict in his favor for \$3,000. Defendants' motion for a new trial and for judgment non obstante veredicto were overruled, judgment was entered on the verdict, and this appeal followed.

The complaint consisted of two counts, the first charging defendants with negligence, and the second with wilful and wanton conduct. - The second count was withdrawn pursuant to leave of court before the jury retired, leaving the question of negligence as the only issue submitted to the jury.

It appears from the evidence that April 26, 1934, defendant Henry Merik was driving a tractor belonging to his employer, Goldblatt Bros., Inc., in a northerly direction on Damen avenue, and when he reached 35th street the motor stalled on the eastbound car track, for lack of gasoline. Merik got out and attempted to push the tractor off the street intersection, but could not do so alone. Plaintiff was standing on the northeast corner of 35th street and

22222

WILLIAM C. HUNTER,
Appellee,

v.

GOLDBLATT BROS., Inc.,
and HENRY MERIK,
Appellants.

COOK COUNTY.

APPEAL FROM CIRCUIT COURT.

MR. JUSTICE PRINCE delivered the opinion of the court.

Plaintiff was injured by a tractor owned by Goldblatt

Bros., Inc., and driven by its employee, Henry Merik. In an

action on the case brought by plaintiff to recover damages for

the injuries sustained, the jury returned a verdict in his

favor for \$3,000. Defendants' motion for a new trial and for

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court before the jury retired, leaving the question of negligence

as the only issue submitted to the jury.

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Henry Merik was driving a tractor belonging to his employer, Gold-

blatt Bros., Inc., in a northerly direction on Tamen Avenue, and

when he reached 35th street the motor stalled on the southbound car

track, for lack of gasoline. Merik got out and attempted to push

the tractor off the street intersection, but could not do so alone.

Plaintiff was standing on the northeast corner of 35th street and

222 I.A. 630

Damen avenue, talking to one Charles Koestner. Merik testified that Huebner came over, inquired what had happened, and when told that the tractor had run out of gas Huebner suggested that he would assist in pushing the tractor off the car track. Huebner, on the other hand, testified that Merik asked his assistance. At any rate, the two men proceeded to push the tractor from the intersection. Merik stood on the west side of the tractor, with one hand on the back of the cab, and plaintiff stood on the right hand or east side, likewise pushing against the back of the cab. They pushed the tractor along for several feet, and, in the process of doing so, plaintiff's left foot got under the right rear wheel of the tractor, injuring him.

So far as defendants' liability is concerned it would make no difference, in determining the relationship of the parties, whether plaintiff volunteered his assistance to Merik or whether the latter asked plaintiff for help. In either event plaintiff was under no obligation to assist, and therefore his services were necessarily voluntary. In helping Merik, he was, of course, obliged to exercise due care and caution for his own safety. Before the trial plaintiff made a deposition, under the Civil Practice act, wherein he related the following circumstances leading up to the accident.

"Q. Did he tell you what to do or did you tell him what to do at that time?

N. No.

Q. How did you happen to slip? A. I can't say.

Q. Well, when you were pushing the truck you say you slipped and then the back wheel went over your foot, is that correct? A. Well, yes, sir.

Q. When you slipped did you fall right down on the pavement?

A. Why this here caught my foot when I slipped."

On the trial plaintiff's evidence differed slightly from that given by deposition. He there stated that Merik said "Come on, give me a hand;" that he inquired if Merik was out of gas and the latter replied that he was and then said to plaintiff, "Grab

James Avenue, talking to one Charles Roemer, Mark testified that Huebner came over, inquired what had happened, and then told that the tractor had run out of gas. Huebner suggested that he would assist in pushing the tractor off the car track. Huebner, on the other hand, testified that Mark asked his assistance. At any rate, the two men proceeded to push the tractor from the intersection. Mark stood on the west side of the tractor, with one hand on the back of the cab, and plaintiff stood on the right hand or east side, likewise pushing against the back of the cab. They pushed the tractor along for several feet, and, in the process of doing so, plaintiff's left foot got under the right rear wheel of the tractor, injuring him.

So far as defendant's liability is concerned it would make no difference, in determining the relationship of the parties, whether plaintiff volunteered his assistance to Mark or whether the latter asked plaintiff for help. In either event plaintiff was under no obligation to assist, and therefore his services were necessarily voluntary. In helping Mark, he was, of course, obliged to exercise due care and caution for his own safety. Before the trial plaintiff made a deposition, under the Civil Practice Act, wherein he related the following circumstances leading up to the accident.

"Q. Did he tell you what to do or did you tell him what to do at that time?
 A. No.
 Q. How did you happen to slip? A. I don't say.
 Q. Well, when you were pushing the truck you say you slipped and then the back wheel went over your foot, is that correct? A. Well, yes, sir.
 Q. How you slipped did you fall right down on the pavement?
 A. By this time I caught my foot when I slipped."

On the trial plaintiff's evidence differed slightly from that given by deposition. He then stated that Mark said "Come on, give me a hand;" that he helped it back out of gas and

hold on the other side there," pointing to the right side of the tractor; that when Merik got hold on the left, or west side of the truck, plaintiff took it for granted that Merik wanted him to take hold on the opposite side, and he did so accordingly; that they both started pushing; and "I guess the truck was going about ten feet and I was ready to let loose when something grabbed my foot." On cross-examination, plaintiff testified that he was several feet from the back end of the cab; that Merik started pushing on one side and he (plaintiff) started pushing on the other; that he did not remember slipping, and when asked "How did your foot get under the back wheel?" he answered "I don't know."

The circumstances under which plaintiff's foot was caught under the rear wheel of the tractor are probably best indicated by his own evidence on cross-examination, as follows:

"The first thing I noticed out of order was that my left foot was under the rear wheel. The truck was in motion. I was going to walk away. The cab was still moving and I was walking along with it.

Q. And while you were walking along with the tractor, you say the right rear wheel of the tractor came up onto your left foot?

A. Yes, sir.

Q. Is that the way it happened? A. That is the way it happened."

The only other witnesses for plaintiff were Charles Koestner and two girls, Shirley Kramer and Rachel Mann, all of whom testified to the events leading up to the accident, but they throw no further light on the exact manner in which plaintiff was injured.

Negligence is the failure to use ordinary care. As applicable to plaintiff's conduct, it is immaterial whether he slipped on the pavement, causing his foot to get under the moving wheel of the tractor, or whether through inattention or inadvertence he allowed his foot to get under the wheel. In either event Merik was not responsible for the immediate injury. On the question of defend-

held on the other side there," pointing to the right side of the tractor; that when Mark got held on the left, or west side of the truck, Plaintiff took it for granted that Mark wanted him to take hold on the opposite side, and he did so accordingly; that they both started pushing; and I guess the truck was going about ten feet and I was ready to let loose when something tripped my foot." On cross-examination, Plaintiff testified that he was several feet from the back end of the cab; that Mark started pushing on one side and he (Plaintiff) started pushing on the other; that he did not remember slipping, and when asked "How did your foot get under the back wheel?" he answered "I don't know."

The circumstances under which Plaintiff's foot was caught under the rear wheel of the tractor are probably best indicated by his own evidence on cross-examination, as follows:

"The first thing I noticed out of order was that my left foot was under the rear wheel. The truck was in motion. I was going to walk away. The cab was still moving and I was walking along with it."

Q. And while you were walking along with the tractor, you say the right rear wheel of the tractor came up onto your left foot?

A. Yes, sir.

Q. Is that the way it happened? A. That is the way it happened."

The only other witnesses for Plaintiff were Charles Hootner and two girls, Shirley Kramer and Rachel Ann, all of whom testified to the events leading up to the accident, but they know no further light on the exact manner in which Plaintiff was injured.

Negligence is the failure to use ordinary care, as applicable to Plaintiff's conduct; it is immaterial whether he slipped on the pavement, causing his foot to get under the moving wheel of the tractor, or whether through inattention or inadvertence he allowed his foot to get under the wheel. In either event Mark was not

ants' negligence, plaintiff seems to rely on the following circumstance: After the tractor had been pushed about ten feet and plaintiff was about ready to let go, he said that "something grabbed my foot, and I looked around, like that, and at that I heard Charlie yell, 'hold it,' and at that I felt it go over and everything got black in front of me." Plaintiff's counsel argues that after Koestner yelled, "hold it," Merik gave an additional push, but according to plaintiff's own testimony the wheel of the tractor passed over his foot almost simultaneously with Koestner's call to "hold it." The exact manner in which this accident happened is unexplained. The right rear wheel of the tractor passed over plaintiff's left foot. There is nothing in the record to indicate that Merik did anything that he should not have done, or that he failed to do something which he should have done. From a careful examination of the record it clearly appears that plaintiff was not injured through the negligence of Merik. The rule is clear that in order to recover plaintiff must prove negligence as charged in his complaint, and must also show that he was in the exercise of due care and caution for his own safety. He failed to prove his case and therefore he cannot recover.

In view of what we have said, the court should either have taken the case from the jury or allowed defendants' motion for judgment non obstante veredicto. It is unfortunate that plaintiff was injured but he cannot recover on the facts in this case, and it would therefore serve no useful purpose to remand the case for a new trial. Accordingly, the judgment of the circuit court is reversed.

REVERSED.

Sullivan, P. J., and Scanlan, J., concur.

ants' negligence, plaintiff seems to rely on the following circumstances: After the tractor had been pushed about ten feet and plaintiff was about ready to let go, he said that "something grabbed my foot, and I looked around, like that, and at that I heard Charles yell, 'hold it,' and at that I let it go over and everything got black in front of me." Plaintiff's counsel argues that after Kestner yelled, "hold it," Merik gave an additional push, but according to plaintiff's own testimony the wheel of the tractor passed over his foot almost simultaneously with Kestner's call to "hold it." The exact manner in which this accident happened is unexplained. The right rear wheel of the tractor passed over plaintiff's left foot. There is nothing in the record to indicate that Merik did anything that he should not have done, or that he failed to do something which he should have done. From a careful examination of the record it clearly appears that plaintiff was not injured through the negligence of Merik. The rule is clear that in order to recover plaintiff must prove negligence as charged in his complaint, and must also show that he was in the exercise of due care and caution for his own safety. He failed to prove his case and therefore he cannot recover.

In view of what we have said, the court should either have taken the case from the jury or allowed defendant's motion for judgment non obstante veredicto. It is unfortunate that plaintiff was injured but he cannot recover on the facts in this case, and it would therefore serve no useful purpose to remand the case for a new trial. Accordingly, the judgment of the circuit court is reversed.

REVEREND.

38874

THE FIRST NATIONAL BANK OF CHICAGO,
Appellant,

v.

JOHN KOSTAKIS et al.,
Defendants below.

JAMES N. NICHOLS,
Appellee.

90
APPEAL FROM CIRCUIT
COURT, COOK COUNTY.

287 I.A. 631¹

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

The First National Bank of Chicago brought suit against James N. Nichols, John Kostakis, John Vasilopoulos and John T. Argiris, upon four Principal promissory notes each of which purports on its back to be guaranteed by these defendants. Only Vasilopoulos and James N. Nichols were served; the former defaulted. Nichols pleaded to the declaration and trial being had by jury a verdict was returned in favor of Nichols and judgment entered thereon. This appeal followed.

Defendants and others purchased various parcels of improved real estate at the southwest corner of 86th street and Ashland avenue, Chicago, which was subject to a \$50,000 mortgage. Title was taken in the name of Washington Park National Bank, as trustee for the benefit of the purchasers, under a declaration of trust reciting that the trustee was to hold title for the ultimate use and benefit of the defendants and others as beneficiaries, and that the trustee should deal with the property only as and when directed so to do in writing by the four individual beneficiaries who were made defendants to this proceeding. Washington Park National Bank took

38874

THE FIRST NATIONAL BANK OF CHICAGO,
Appellant,

v.

JOHN KONTAKIS et al.,
Defendants below.

JAMES H. NICHOLS,

Appellee.

MR. JUSTICE BREWER delivered the opinion of the court.

The First National Bank of Chicago brought suit against

James H. Nichols, John Kontakis, John Vasilopoulos and John T.

Agrios, upon four promissory notes each of which pur-

ports on its face to be guaranteed by these defendants. Only

Vasilopoulos and James H. Nichols were served; the former de-

faulted. Nichols pleaded to the declaration and trial being had

by jury a verdict was returned in favor of Nichols and judgment

entered thereon. This appeal followed.

Defendants and others purchased various parcels of improved

real estate at the southwest corner of 80th street and Ashland

avenue, Chicago, which was subject to a \$50,000 mortgage. Title was

taken in the name of Washington Park National Bank, as trustee for

the benefit of the purchasers, under a declaration of trust reciting

that the trustee was to hold title for the ultimate use and benefit

of the defendants and others as beneficial trustees, and that the trustee

should deal with the property only as and when directed so to do

in writing by the four individual beneficial trustees who were made

parties to the declaration.

287 I.A. 681

CHICAGO, COOK COUNTY.

APPEAL FROM CIRCUIT COURT.

title as trustee pursuant to the trust agreement. The existing \$50,000 mortgage was held by the Washington Park National Bank. For the purpose of paying up this incumbrance defendants secured a loan of \$50,000 on the property from the First National Bank of Chicago. To consummate the loan defendants appeared at the bank with another beneficiary, and for the purpose of executing the guarantees required by the bank they each signed their name on the back of the several notes. Above their signatures appears the following rubber stamp legend:

"For value received we hereby guarantee the payment of the within note at maturity or at any time thereafter, waiving demand, notice of nonpayment and protest."

The notes are all the same, except as to amount, and read as follows:

"Chicago, Illinois,
March 1, A. D. 1928.

On or before five years after date, for value received, Washington Park National Bank, a corporation, not personally but as Trustee under * * * Trust Number 23, hereby promises out of that portion of the Trust Estate subject to said Trust Agreement specifically described in the Trust Deed given to secure the payment hereof, to pay to bearer, * * * the principal sum of * * * Dollars, * * * with interest thereon payable in the same manner as said principal sum * * * at the rate of six per centum per annum, payable * * * on the first day of March and September in each year until maturity, and with interest after maturity until paid at the highest rate for which it is now in such case lawful to contract; * * *.

This note is executed by Washington Park National Bank of Chicago, not personally, but as trustee as aforesaid * * *, and is payable only out of the property specifically described in said Trust Deed securing the payment hereof, * * *. No personal liability shall be asserted or be enforceable against the promisor or any person interested beneficially or otherwise in said property * * *, or in the property or funds at any time subject to said Trust Agreement because or in respect of this note, or the making, issue or transfer thereof, all such liability, if any, being expressly waived by each taker and holder hereof, but nothing herein contained shall modify or discharge the personal liability expressly assumed by the guarantors hereof and each original and successive holder * * * accepts the same upon the express condition * * * that in case of default in the payment of this note or of any installment of interest, the sole remedy of the holder hereof or of any of the interest coupons * * * shall be by foreclosure of the said Trust Deed * * * or by action to enforce the personal liability of the guarantors hereof or both."

The following rubber stamp legend:

"For value received, I hereby warrant the payment of the within note at maturity on any time thereafter, giving demand, notice of non-payment and protest."

follows:

"This is the only one of its kind in the world."

On or before five years after date, for value received, Washington Park National Bank, a corporation, not personally but as Trustee under and to the Trust Agreement, promises out of that portion of the Trust Estate subject to said Trust Agreement specifically described in the Trust Agreement to give to the payment hereof, to pay to bearer, \$ * the principal sum of \$ * dollars, \$ * with interest thereon payable in the same manner as said principal sum \$ * at the rate of six per centum per annum, payable \$ * on the first day of March and September in each year until maturity, and with interest thereon to be paid to the interest holder of which it is now in such case I wish to contract \$ *.

This note is executed by certain persons for the purpose of
 of Chicago, not personally, but as trustee or agent
 and is payable only out of the property specifically described
 in said Trust Deed and the payment thereon shall be made
 personally or by the person named in the Deed or by the
 the promisor or any person named in the Deed or by the
 in said property. . . . or in the property or interest in
 time subject to said Trust Agreement before or in respect of
 this note, or the making, issue or execution thereof, all such
 liability, if any, being expressly waived by said Trust and
 holder hereof, but nothing herein contained shall limit or
 change the personal liability expressly assumed by the
 of said note and the respective holder. . . .
 same upon the express condition . . . that in case of default in
 the payment of this note or of any installment thereon, the
 sole remedy of the holder hereof or of any of the interest hereon
 shall be by foreclosure of the mortgage hereinbefore
 given to enforce the personal liability of the persons named

The sole issue of fact presented to the jury was whether these notes bore the rubber stamp legend of guarantee at the time defendants affixed their signatures. The affidavit of defense interposed by Nicols averred that he was not indebted to plaintiff, that he did not guarantee the payment, that the words on the back of each note, preceding his signature, were not on or attached to any portion of the notes above his signature at the time he signed his name, that he affixed his signature to the notes as indorser and not as guarantor, that no presentment was made on him when the notes fell due, that they were not made for the accommodation of Nichols or the other defendants, and that no notice of dishonor was given him.

It is undisputed that the four principal notes, as well as the interest coupons attached thereto, were all signed at the same time and in the following order: "John Kostakis, James N. Nichols, John Vasilopoulos and John T. Argiris." All of the defendants and one other beneficiary testified that the rubber stamp legend did not appear on any of the notes at the time they signed. As against this defense, plaintiff produced the testimony of M. J. Frische, an employee in the loan department of the First National Bank, who testified that the stamped legend appeared on all the notes when defendants affixed their signatures. Upon this evidence the court submitted the issue to the jury under the following instruction offered by defendant Nichols:

"The Court instructs the jury that as a matter of law, if, after hearing the evidence, they believe the words of Guarantee were not endorsed on or upon the note or notes sued on in this case at the time of the endorsing of the same by the defendant, James N. Nichols, it is your duty to find the issues in favor of said defendant, James N. Nichols."

To sustain the judgment counsel for Nichols takes the position that plaintiff sued defendants as guarantors; that the sole issue of fact presented was whether the stamp of guarantee appeared

The sole issue of fact presented to the jury was whether these notes bore the imprint of the hand of the defendant or not. The defendant admitted that the notes were not indorsed by Nichols, but he did not admit that the notes on the back of each note, bearing his signature, were not in or attached to any portion of the notes above his signature at the time he signed his name, that he signed his name to the notes as indorser and not as a debtor, that no presentation was made on him when the notes fell due, that they were not cashed for the accommodation of Nichols or the other defendants, and that no notice of dishonor was given him.

It is undisputed that the four principal notes, as well as the interest coupons attached thereto, were all signed at the same time and in the following order: "John Kostas, James E. Nicholas, John Vasilopoulos and John T. Agilis." All of the defendants and one other defendant testified that the words stamp legend did not appear on any of the notes at the time they signed. As against this defendant, plaintiff produced the testimony of M. J. Wisniewski, an employee in the loan department of the First National Bank, who testified that the stamp legend appeared on all the notes when defendants affixed their signatures. Upon this evidence the court submitted the issue to the jury under the following instruction offered by defendant Nicholas:

"The Court instructs the jury that as a matter of law, if, after hearing the evidence, they believe the note of defendant was not endorsed on or after the date on which it was made, in this case at the time of the execution of the same by the defendant, James E. Nicholas, it is your duty to find the cause is favor of said defendant, James E. Nicholas."

To sustain the judgment rendered for Nichols takes the position that plaintiff owed defendants an endorsement; that the issue of fact presented was whether the stamp or legend appeared

on the notes before defendants affixed their signatures thereto; that the jury by their verdict found in favor of defendants, and the case having been fairly tried the verdict of the jury and the judgment thereon should not be disturbed.

Under ordinary circumstances we should be inclined to concur in defendants' contention, but we are convinced from the circumstances of this case, as disclosed by the record, that the verdict was contrary to the manifest weight of the evidence for the following reasons. These notes were made by a trustee and were so drawn as to expressly relieve the trustee from all personal liability and to require the holder thereof to look solely to the trust property for payment. The First National Bank, therefore, evidently deemed it necessary to require additional security, and defendants by their signatures were apparently willing to give the bank the additional personal security desired to secure the loan. Consequently the notes were drawn in the form of guaranties providing that "nothing herein contained shall modify or discharge the personal liability expressly assumed by the guarantors hereof." The notes further provided that each holder thereof accepted upon the express condition that the sole remedy should be by foreclosure of the trust deed, "or by action to enforce the personal liability of the guarantors hereof, or both." This particular property was held by the trustee for the beneficiaries, including the four defendants, and the loan, which is evidenced by the notes here sued on, was made for the benefit of these parties, who had applied to the First National Bank for a loan sufficient to retire the existing mortgage on the property. They undoubtedly agreed to sign these notes, appeared at the bank for that purpose, and did, in fact, sign them, and it would have been absurd for the First National Bank to lend them \$50,000 on notes which expressly exempted the maker

on the notes before defendant offered their testimony; that the jury by their verdict found in favor of defendant, and the case having been fairly tried the verdict of the jury and the judgment thereon should not be disturbed.

Under ordinary circumstances we should be inclined to concur in defendant's contention, but we are convinced from the circumstances of this case, as disclosed by the record, that the verdict was contrary to the manifest weight of the evidence for the following reasons. These notes were made by a trustee and were so drawn as to expressly relieve the trustee from all personal liability and to require the holder thereof to look solely to the trust property for payment. The First National Bank, therefore, evidently deemed it necessary to require additional security, and defendant by their statement was apparently willing to give the bank the additional personal security desired to secure the loan. Consequently the notes were drawn in the form of promissory notes, and "nothing herein contained shall modify or discharge the personal liability expressly assumed by the trustee hereof." The notes further provided that each holder thereof accepted upon the express condition that the sole remedy should be by foreclosure of the trust deed, "or by action to enforce the personal liability of the trustee hereof, or both." This personal property was held by the trustee for the beneficiaries, including the four defendants, and the loan, which is evidenced by the notes here and on, was made for the benefit of these parties, who had applied to the First National Bank for a loan and failed to obtain the existing mortgage on the property. They undoubtedly agreed to sign these notes, appearing at the bank for that purpose, and did, in fact, sign them, and it would have been absurd for the First National Bank to have then (50-00) on notes which expressly exempted the

from personal liability without requiring some other security. The language employed clearly indicates that these were notes of guaranty and that when defendants signed they signed as guarantors and not as indorsers. To hold otherwise would render the language used in the instruments meaningless.

It has been generally held that any contract or paper is to be construed by all that it contains, and that "a bill or note, the same as any other written instrument, must be construed as a whole, so as to give effect to every part of it, if possible. The contract must be collected from the 'four corners' of the document, and no part of what appears there is to be excluded; and it has been suggested that, inasmuch as indorsements are made on the back of a negotiable instrument, it may be said that the purport of the instrument is to be collected from the 'eight corners.'" (8 Corpus Juris, p. 85, sec. 136.)

Moreover, certain significant facts appear from the indorsements on the notes. It was stipulated by the parties that the original record of proceedings on the trial should be incorporated in the transcript of record filed in this court, and we therefore have before us the original notes as well as photostatic copies thereof. An examination of these instruments shows that the rubber stamp of guarantee was affixed on each note approximately three inches from the top, and the signatures of the four defendants followed closely thereunder. These signatures appear almost in the middle of the reverse side of the instrument. Unless the stamp of guarantee had appeared on the instrument prior to the time defendants signed these notes, it is difficult to understand why their signatures should uniformly appear so far down on the paper. Moreover, it clearly appears from an examination of the indorsements by the naked eye that on some of the notes part of the signature of John Kostakis, the first signer, is superimposed over the last

from personal liability without requiring some other security. The language employed clearly indicates that there was no note of guaranty and that the bank did not intend they should be sureties and not as indorsers. To hold otherwise would render the language used in the instrument meaningless.

It has been generally held that any contract on paper is to be construed by all that it contains, and that a bill or note, the same as any other written instrument, must be construed as a whole, so as to give effect to every part of it, if possible. The contract must be collected from the 'four corners' of the document, and no part of that sphere that is to be included; and it has been suggested that, inasmuch as indorsements are made on the back of a negotiable instrument, it may be said that the purport of the instrument is to be collected from the 'eight corners.' (8 Corpus Juris, p. 85, sec. 136.)

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line of the rubber stamp indorsement, and an examination of these signatures in relation to the stamp with a magnifying glass leaves no doubt thereof. The notes were submitted to the jury, and if they had looked at them these facts could not have escaped their attention. This evidence renders defendants' contention that the stamp was affixed after the notes were signed highly improbable, and taken together with the language employed in the notes and the position of the indorsements on the back of the notes, lends support to Frische's testimony that when the indorsements were made by defendants the stamp of guarantee had been affixed to each note.

The single instruction given by the court was clearly erroneous, because it failed to include some of the most important considerations in controversy bearing upon issue of fact, but plaintiff's counsel asked for no other instruction nor did they suggest any change in the one given. Other points urged for reversal need not be discussed in view of what has been said as to the facts of the case.

In view of the conclusions reached, we think it would amount to a miscarriage of justice to allow this verdict and judgment to stand. The loan was made for the benefit of defendants and they should not be acquitted of their obligation upon such a verdict as this. The judgment of the circuit court is reversed and the cause remanded for a new trial.

JUDGMENT REVERSED AND CAUSE REMANDED.

Sullivan, P. J., and Scanlan, J., concur.

line of the rubber stamp instrument, and an examination of these signatures in relation to the stamp with a magnifying glass shows no doubt thereof. The notes were admitted to the jury, and it they had looked at them these facts could not have escaped their attention. This evidence requires defendant's attention that the stamp was affixed after the notes were already highly impounded, and taken together with the language employed in the notes and the position of the instruments on the back of the notes, I find support to defendant's contention that when the instruments were made by defendant the stamp of defendant had been affixed to each note.

The single instruction given by the court was clearly erroneous, because it failed to include some of the most important considerations in controversy bearing upon issue of fact, but plaintiff's counsel asked for no other instruction nor did they suggest any change in the one given. Other points urged for reversal need not be discussed in view of what has been said as to the facts of the case.

In view of the conclusion reached, we think it would amount to a waste of time for the court to allow this verdict and judgment to stand. The law was made for the benefit of defendants and they should not be subjected of their obligation upon such a verdict as this. The judgment of the district court is reversed and the cause remanded for a new trial.

38929

PEOPLE OF THE STATE OF
ILLINOIS,

Defendant in Error,

v.

PETER J. ALLEGRETTI,
Plaintiff in Error.

91
ERROR TO MUNICIPAL
COURT OF CHICAGO.

287 I.A. 631²

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Under an information filed in the Municipal court of Chicago by the People of the State of Illinois charging defendant with reckless driving, and pursuant to a trial before the court without a jury, defendant was found guilty of a violation of sec. 48 of the Uniform act regulating traffic (chap. 121, par. 323, Illinois State Bar Stats. 1935) and fined \$50 and costs. He seeks by this writ of error to reverse that judgment.

The information, filed October 4, 1935, charged that September 13, 1935, Peter J. Allegretti -

"did then and there operate a motor vehicle upon a public highway of this State situated within the corporate limits of the City of Chicago aforesaid in a wanton or reckless manner, showing an utter disregard for the safety of others under circumstances likely to cause great bodily injury and did thereby then and there cause an injury to another, to-wit: Harry Winsberg, which said injury did not result in death contrary to the form of the Statutes in such case made and provided, and against the peace and dignity of the People of the State of Illinois."

On the left hand margin of the information appears the following printed notation: "1st Count, Sec. 41B, M.V.L."

After several continuances the matter came on for hearing in the municipal court February 5, 1936. Defendant then made a motion to quash the information, which was entered and hearing

PEOPLE OF THE STATE OF
ILLINOIS,

Defendant in Error,

v.

PETER J. ALLEGRETTI,
Plaintiff in Error.

COUNTY OF CHICAGO.
COURT OF MUNICIPAL

227 I.A. 631

MR. JUSTICE FRANKLIN DELIVERED THE OPINION OF THE COURT.

Under an information filed in the Municipal Court of Chicago by the People of the State of Illinois charging defendant with reckless driving, and pursuant to a trial before the court without a jury, defendant was found guilty of a violation of sec. 48 of the Uniform act regulating traffic (chap. 121, par. 323, Illinois State Bar State, 1935) and fined \$50 and costs. He seeks by this writ of error to reverse that judgment. The information, filed October 4, 1935, charged that

September 13, 1935, Peter J. Allegretti -

"did then and there operate a motor vehicle upon a public highway of this State situated within the corporate limits of the City of Chicago recklessly in a manner or reckless manner, knowing or after disregard for the safety of others under circumstances likely to cause great bodily injury and his thereby then and there cause an injury to another, to-wit: Harry W. Harnburg, which said injury did not result in death contrary to the form of the Statute in such case made and provided, and against the peace and dignity of the People of the State of Illinois."

On the left hand margin of the information appears the following

printed notation: "1st Court, Sec. 412, N.V.L."

After several continuances the matter came on for hearing

in the Municipal Court February 5, 1936. Defendant then made a

motion to quash the information, which was entered and hearing

thereon deferred. Later, the same date, defendant appeared in his own person as well as by counsel, and, after arraignment, pleaded not guilty to the charge in the information and waived trial by jury. The cause was then postponed and set for hearing, and tried February 8, 1936.

Some nine witnesses testified at the hearing, and from the evidence adduced it appears that at about 9:30 p. m., September 13, 1935, defendant was driving south on Independence boulevard, just north of where it intersects with Roosevelt road. This intersection is marked by stop and go signals. As he approached Roosevelt road the lights changed to amber and then green for east and west traffic. Another car had come to a stop before the intersection and defendant, who was evidently driving at a high rate of speed, could not stop his car in time, swerved to the left, struck the car ahead of him, ran up on the curb and injured one Harry Winsberg, a pedestrian, walking west on Roosevelt road on the sidewalk on the north side of the street. Numerous witnesses testified that defendant was driving his car at a speed varying from 40 to 70 miles an hour. Defendant denied this and stated that he was not driving in excess of 30 miles an hour, but that was a question of fact for the court to determine, and from a careful examination of the evidence we think the court was fully justified in finding that defendant was driving at a high rate of speed and recklessly.

As grounds for reversal it is first urged that the printed notation on the margin of the information indicated that defendant was charged with violation of sec. 41-B of the Motor Vehicle act, which had been repealed in July, 1935. Considerable space is devoted in defendant's brief to the argument that a person cannot be convicted on a statutory charge which has been repealed, either expressly or by implication, prior to the offense, and authorities

therein deferred. Later, the same date, defendant appeared in his own person as well as by counsel, and, after arraignment, pleaded not guilty to the charge in the information and waived trial by jury. The case was then postponed and set for hearing, and tried February 8, 1936.

Some nine witnesses testified at the hearing, and from the evidence adduced it appears that at about 9:30 p. m., September 13, 1935, defendant was driving south on Independence Boulevard, just north of here it intersects with Roosevelt Road. This intersection is marked by stop and go signals. As he approached Roosevelt Road the lights changed to red and then green for east and west traffic. Another car had come to a stop before the intersection and defendant, who was evidently driving at a high rate of speed, could not stop his car in time, swerved to the left, struck the car ahead of him, ran up on the curb and injured one Harry Ginsburg, a pedestrian, walking west on Roosevelt Road on the sidewalk on the north side of the street. Unknown witnesses testified that defendant was driving his car at a speed varying from 40 to 70 miles an hour. Defendant denied this and stated that he was not driving in excess of 30 miles an hour, but that was a question of fact for the court to determine, and from a careful examination of the evidence we think the court is fully justified in finding that defendant was driving at a high rate of speed and recklessly.

As grounds for reversal it is first urged that the United States Attorney on the basis of the information indicated that defendant was charged with violation of sec. 41-B of the Motor Vehicle Act, which had been repealed in July, 1935. Considerable space is devoted in defendant's brief to the argument that a person cannot be convicted on a statutory charge which has been repealed, either expressly or by implication, prior to the offense, and authorities

are cited to sustain the contention. The state, by its counsel, says it is entirely in accord with these authorities, but insists that the small type abbreviations printed vertically on the left hand margin of the information is not a part of the charging part of the information, and we are entirely in accord with the state's position. The blanks on which informations are drawn in the municipal court are partly printed and notations on the margins are not part of the information. It is apparent from a reading of the information that defendant was charged with reckless driving in violation of sec. 48 of the Uniform act regulating traffic (sec. 48, par. 323, chap. 121, Ill. State Bar Stats., 1935) which reads as follows:

"Sec. 48. Reckless driving. (a) Any person who drives any vehicle with a wilful or a wanton disregard for the safety of persons or property is guilty of reckless driving.

(b) Every person convicted of reckless driving shall be punished upon a first conviction by imprisonment for a period of not less than 5 days nor more than 90 days, or by fine of not less than Ten Dollars (\$10.00) nor more than Five Hundred Dollars (\$500), or by both such fine and imprisonment, and on a second or subsequent conviction shall be punished by imprisonment for not less than 10 days nor more than 6 months, or by a fine of not less than One Hundred Dollars (\$100) nor more than One Thousand Dollars (\$1,000), or by both such fine and imprisonment."

He was tried under the foregoing statute and found guilty, and not for violation of sec. 41-B of the Motor Vehicle act as he contends.

It is next urged that the court erred in overruling defendant's motion to quash the information. It appears from the abstract that defendant pleaded not guilty before a ruling was made on his motion to quash, and in view of this fact he waived his right to raise the point on appeal. It was so held in Long v. People, 102 Ill. 331, wherein the court said - (p. 336)

"as to the motion to quash, it is not a rash presumption that all persons in the profession know that such a motion is waived by pleading to suit or action."

Also in Krueger v. People, 141 Ill. App. 510, the court characterized the point as "purely technical, which could be taken advantage of,

are cited to sustain the contention. The state, by its counsel, says it is entirely in accord with these authorities, but insists that the small type abbreviations printed vertically on the left hand margin of the information is not a part of the charging part of the information, and we are entirely in accord with the state's position. The blanks on which information are drawn in the municipal court are partly printed and notations on the margins are not part of the information. It is apparent from a reading of the information that defendant was charged with reckless driving in violation of sec. 48 of the Uniform Act regulating traffic (sec. 48, par. 323, chap. 121, Ill. State Bar Stat., 1935) which reads

as follows:

"Sec. 48. Reckless driving. (a) Any person who drives any vehicle with a willful or malicious disregard for the safety of persons or property is guilty of reckless driving. (b) Every person convicted of reckless driving shall be punished upon a first conviction by imprisonment for a period of not less than 5 days nor more than 90 days, or by fine of not less than Ten Dollars (\$10.00) nor more than Five Hundred Dollars (\$500.00), or by both such fine and imprisonment, and on a second or subsequent conviction shall be punished by imprisonment for not less than 15 days nor more than 6 months, or by a fine of not less than One Hundred Dollars (\$100) nor more than One Thousand Dollars (\$1,000), or by both such fine and imprisonment."

He was tried under the foregoing statute and found guilty, and not for violation of sec. 41-B of the Motor Vehicle Act as he contended. It is next urged that the court erred in overruling defendant's motion to quash the information. It appears from the abstract that defendant pleaded not guilty before a ruling was made on his motion to quash, and in view of this fact he waived his right to raise the point on appeal. It was so held in Long v. People, 193 Ill. 331, wherein the court said - (p. 330) "as to the motion to quash, it is not a mere proposition that all persons in the profession know that such a motion is waived by pleading to suit or action."

Also in Kramer v. People, 141 Ill. App. 410, the court characterized the point as "purely technical, which would be taken advantage of,

if at all, by motion to quash, which motion the defendant did not make, but pleaded not guilty and went to trial on the merits." Moreover, inasmuch as a plea of not guilty had been entered by defendant and all the testimony had been heard before a ruling was made on his motion, the hearing on the merits of the case, under the authorities, amounted to a denial of the motion.

(People v. Sholem, 244 Ill. 502.) In that case motion to quash was interposed, which the court took under advisement and thereafter heard and decided the case and entered final judgment without ruling on the motion. The Supreme court said that this amounted to a denial of the motion.

It is also urged that the information charging defendant was uncertain. We think it amply sets forth the charge of reckless driving under sec. 48, and that it fully apprised defendant of the charges preferred against him.

Lastly, it is urged that the trial court erred in not granting defendant a new trial, inasmuch as the judgment finding him guilty was against the manifest weight of the evidence and he was not proven guilty beyond a reasonable doubt. From a careful examination of the record we find that numerous witnesses testified that defendant was driving at an excessive rate of speed in approaching an intersection marked by stop and go signals, and that his car was apparently not under control when the lights had changed, making it necessary for him to swerve out of the line of cars, strike the automobile immediately ahead of him and run onto the curb, where a pedestrian was injured. These circumstances, as related by the various witnesses, clearly indicate reckless and careless driving, and the court could not fairly have reached any other conclusion.

Finding no convincing reason for reversal the judgment of the municipal court is affirmed.

AFFIRMED.

Sullivan, P. J., and Scanlan, J., concur.

it is all, by reason to which, which motion the defendant did
not make, but plaintiff was guilty and went to trial on the motion.
However, inasmuch as a plea of not guilty had been entered by
defendant and all the testimony had been heard before a ruling
was made on his motion, the ruling on the motion of the case,
under the authorities, amounted to a denial of the motion.
(Purple v. Pineda, 244 Ill. 502.) In that case motion to quash
was interposed, which the court took under advisement and there-
after heard and decided the case and entered final judgment without
ruling on the motion. The Supreme Court held that this amounted
to a denial of the motion.
It is also urged that the information charging defendant
was uncertain. We think it simply sets forth the charge of reckless
driving under sec. 42, and that it fully apprised defendant of
the charges preferred against him.
Lastly, it is urged that the trial court erred in not
granting defendant a new trial, inasmuch as the judgment finding
him guilty was against the weight of the evidence and
he was not proven guilty beyond a reasonable doubt. From a careful
examination of the record we find that numerous witnesses testified
that defendant was driving at an excessive rate of speed in approxi-
mately an intersection marked by stop and go signs, and that his car
was apparently not under control when the lights had changed, making
it necessary for him to swerve out of the line of cars, strike the
automobile immediately ahead of him and run into the curb, where a
pedestrian was injured. These circumstances, as related by the
various witnesses, clearly indicate reckless and careless driving,
and the court could not fairly have reached any other conclusion.
Stating no convincing reason for reversal the judgment of
the municipal court is affirmed.

92

39119

SADIE BENIK,
Appellant,

v.

WALTER BENIK and
MARY BENIK,
Appellees.

APPEAL FROM CIRCUIT COURT,
COOK COUNTY.

287 I.A. 631³

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

By this appeal Sadie Benik seeks to reverse an order of the circuit court dismissing for want of jurisdiction her petition to set aside the satisfaction of the judgment against defendants herein, which had been filed in the circuit court clerk's office without her knowledge or consent.

The undisputed facts are simple, though extraordinary. Briefly stated plaintiff's petition and the supporting affidavits allege that plaintiff had obtained in the circuit court a tort judgment for \$10,000 against Walter and Mary Benik, in satisfaction of which the sheriff had on December 27, 1933, seized Mary Benik under a writ of capias ad satisfaciendum and committed her to the county jail, Walter Benik having previously left the state of Illinois. Defendants' attorney, Milton J. Sabath, procured her release the same day through an agreement by which she was to pay plaintiff \$25 weekly toward satisfaction of the judgment. Payments aggregating \$1,425 were made and continued to December, 1935, and then ceased. Upon inquiry plaintiff learned in December, 1935, that shortly prior thereto her attorney, Benjamin Vanderveld, without her knowledge or consent, had accepted from Milton J. Sabath,

30112

SADIE BENIK,

Appellant,

v.

WALTER BENIK and

MARY BENIK,

Appellees.

APPEAL FROM CIRCUIT COURT,

COOK COUNTY.

2871.A.631

MR. JUSTICE FRIED DELIVERED THE OPINION OF THE COURT.

By this appeal Sadie Benik seeks to reverse an order

of the circuit court dismissing her writ of habeas corpus. Her petition to set aside the satisfaction of the judgment against her and her husband herein, which had been filed in the circuit court of Cook County, without her knowledge or consent.

The undisputed facts are simple, though extraordinary. Briefly stated, plaintiff's petition and the supporting affidavits allege that plaintiff had obtained in the circuit court a writ of habeas corpus for \$10,000 against Walter and Mary Benik, in satisfaction of which the sheriff had on December 27, 1935, seized Mary Benik under a writ of capias ad satisfaction and committed her to the county jail. After Benik having previously left the state of Illinois. Defendants' attorney, Milton J. Smith, procured her release the same day through an agreement by which she was to pay plaintiff \$5 weekly toward satisfaction of the judgment. Payments aggregating \$1,425 were made and continued to December 1935, and then ceased. Upon inquiry plaintiff learned in December, 1935, that shortly prior thereto her attorney, Benjamin V. Vachon, had accepted from Milton J. Smith, without her knowledge or consent,

representing Mary Benik, \$200 in full satisfaction of the unpaid balance of her judgment, then amounting to \$8,575, and delivered to Sabath a satisfaction piece which was filed in the circuit court clerk's office. Upon inquiry she further learned that Vanderveld had undergone a mental breakdown and had been confined in a sanitarium in Chicago and later sent to the Elgin state hospital for the insane. The information relating to the unauthorized satisfaction of her judgment had to be elicited from some of Vanderveld's former employees, necessitating a delay until March 31, 1936, when her petition and the necessary supporting affidavits were filed in the circuit court.

Defendants' answer, accompanied by a motion to strike the petition, takes the form of a demurrer. It does not deny any of the averments of the petition, but merely challenges the sufficiency thereof on the ground (1) that the court no longer had jurisdiction of the cause "pursuant to the statutes in such cases so made and provided," and (2) that plaintiff failed to act diligently in pursuing the relief sought. The court dismissed the petition solely for lack of "jurisdiction of the subject matter and of the parties herein." We think it clearly was error to do so for the following reasons: The jurisdictional question applicable to this proceeding is not regulated by any statute; it is to be determined under the fundamental equitable principle, applied by courts from time immemorial, that jurisdiction will be exercised when it is properly invoked after term time to relieve a party from an injustice resulting from the fraudulent acts and

representing Mary Benik, 200 in full satisfaction of the unpaid balance of her judgment, then amounting to \$8,375, and delivered to Sabath a satisfaction piece which was filed in the circuit court clerk's office. Upon January she further learned that Vandersveld had undergone a mental breakdown and had been confined in a sanitarium in Chicago and later sent to the State Hospital for the insane. The information relating to the unauthorized satisfaction of her judgment had to be elicited from some of Vandersveld's former employees, necessitating a delay until March 31, 1936, when her petition and the necessary supporting affidavits were filed in the circuit court.

Defendants' answer, accompanied by a motion to strike the petition, takes the form of a demurrer. It does not deny any of the averments of the petition, but merely challenges the sufficiency thereof on the ground (1) that the court no longer had jurisdiction of the cause "pursuant to the statutes in such cases as made and provided," and (2) that plaintiff failed to act diligently in pursuing the relief sought. The court dismissed the petition solely for lack of "jurisdiction of the subject matter and of the parties herein." We think it clearly was error to do so for the following reasons:

The jurisdictional question applicable to this proceeding is not regulated by any statute; it is to be determined under the fundamental equitable principles, applied by courts from time immemorial, that jurisdiction will be exercised when it is properly invoked after term time to relieve a party from an injustice resulting from the fraudulent acts and

conduct of another. The allegations in the petition and affidavits indicate that a palpable fraud was committed on plaintiff, as a result of which the unpaid portion of her judgment against defendants, amounting to \$8,575, was settled for the nominal sum of \$200 without her knowledge or consent, through her attorney who evidently was not mentally responsible when the settlement was made. Whether Mary Benik and her attorney had any knowledge of Vanderveld's mental condition we are unable to say, but there is on file the uncontroverted affidavit of Walter Pacanowski, a clerk in Vanderveld's office from May 1, 1930, to June 15, 1935, stating that early in June, 1935, he called at the office of Milton J. Sabath, defendants' attorney, for the purpose of obtaining a \$25 check which was then due plaintiff, and at that time informed Sabath that Vanderveld was suffering from a mental and physical disorder and was no longer capable of properly conducting his business. Sabath takes the position that the settlement with Vanderveld was made upon the condition that plaintiff would be willing to accept the \$200 in settlement of her judgment and that, having failed to hear from Vanderveld, he assumed the settlement had been approved, and caused the satisfaction piece to be filed. Vanderveld, of course, cashed the check for \$200, and the proceeds were never turned over to plaintiff.

The early case of Miller v. Lane, 13 Ill. App. 648, is cited and relied on by plaintiff to support the contention that the court had ample jurisdiction to act. In that case plaintiff was the owner of a judgment and his attorney compromised the amount due on the judgment for a sum considerably less and delivered a satisfaction piece to defendants. More than thirty days after the satisfaction

conduct of another. The allegations in the petition and affidavits indicate that a palpable fraud was committed on plaintiff, as a result of which the unpaid portion of her judgment against defendants, amounting to \$2,375, was settled for the nominal sum of \$200 without her knowledge or consent, through her attorney who evidently was not mentally responsible when the settlement was made. Whether Mary Bank and her attorney had any knowledge of Vanderveld's mental condition we are unable to say, but there is on file the uncontroverted affidavit of Walter Pasnowski, a clerk in Vanderveld's office from May 1, 1930, to June 12, 1935, stating that early in June, 1935, he called at the office of Milton L. Zabath, defendants' attorney, for the purpose of obtaining a \$25 check which was then due plaintiff, and at that time informed Zabath that Vanderveld was suffering from a mental and physical disorder and was no longer capable of properly conducting his business. Zabath takes the position that the settlement with Vanderveld was made upon the condition that plaintiff would be willing to accept the \$200 in settlement of her judgment and that, having failed to hear from Vanderveld, he assumed the settlement had been approved, and caused the satisfaction piece to be filed. Vanderveld, of course, cashed the check for \$200, and the proceeds were never turned over to plaintiff.

The early case of Miller v. Lane, 13 Ill. App. 646, is cited and relied on by plaintiff to support the contention that the court had ample jurisdiction to act. In that case plaintiff was the owner of a judgment and his attorney compromised the amount due on the judgment for a sum considerably less and delivered a satisfaction piece to defendants. More than thirty days after the satisfaction

of judgment had been filed of record, plaintiff moved the court to vacate and set aside the satisfaction, which the court did on the ground that plaintiff's attorney had no power or authority to compromise the amount due for a lesser sum without specific authority from plaintiff.

In Jenkins v. Merriweather, 109 Ill. 647, it was held that law courts of record exercise the power to control their processes as long as the proceeding is in fieri, and that a court may, upon motion where proper ground is shown, withdraw and quash executions and other writs, and set aside sales of real estate before they ripen into titles, illustrating the general powers of courts to control their processes, after term.

In Watson v. Reissig, 24 Ill. 281, it was held that a court of law may exercise an equitable jurisdiction over the satisfaction of its own judgments and process. A right of redemption of a judgment debtor had there been levied upon and sold by virtue of another execution. On motion to set aside the satisfaction of judgment arising out of the levy, the court held it to be its duty to vacate the entry of satisfaction of judgment and issue another execution.

In Galway v. City of Chicago, 207 Ill. App. 304, a minor obtained judgment and her next friend assigned it to the attorney of record who collected the amount and filed a satisfaction of the judgment. Upon reaching her majority the minor filed suit in the municipal court alleging that her next friend had no power or authority to assign the judgment. It was held that the minor should have filed a proceeding in the court where the judgment was rendered, to vacate the order of satisfaction of judgment and annul the satisfaction piece, so that she could proceed with her suit on the judgment.

of judgment had been filed of record. Plaintiff moved the court to vacate and set aside the satisfaction, which the court did on the ground that plaintiff's attorney had no power or authority to compromise the money due for a loan with without specific authority from plaintiff.

In Lanning v. Lanning, 109 Ill. 647, it was held that law courts of record exercise the power to control their processes as long as the proceeding is in law, and that a court may, upon motion where proper ground is shown, set aside and grant execution and other writs, and set aside sales of real estate before they ripen into titles, illustrating the general power of courts to control their processes, after term.

In Patton v. Patton, 85 Ill. 101, it was held that a court of law may exercise an equitable jurisdiction over the satisfaction of its own judgments and process. A right of redemption of a judgment debtor had there been levied upon and sold by virtue of another execution. On motion to set aside the satisfaction of judgment arising out of the levy, the court held it to be its duty to vacate the entry of satisfaction of judgment and issue another execution.

In Galley v. City of Chicago, 207 Ill. 304, a minor obtained judgment and her next friend assigned it to the attorney of record who collected the amount and filed a satisfaction of the judgment. Upon receiving her majority the minor filed writ in the municipal court alleging that her next friend had no power or authority to assign the judgment. It was held that the minor should have filed a proceeding in the court where the judgment was rendered, to vacate the order of satisfaction of judgment and amend the satisfaction piece, so that she could proceed with her suit on the judgment.

We think the foregoing decisions are ample authority to sustain plaintiff's position, and defendants cite no cases in point to the contrary. It would, indeed, be a sad commentary on the power of courts to hold that the plaintiff who had been deprived of her rights through palpable fraud, resulting in the compromise of a valid judgment for a nominal sum without her knowledge or consent, had no redress because three months had elapsed. The mere statement of the facts alleged in the petition are sufficient to justify the court in assuming jurisdiction to set aside the satisfaction of the judgment.

The only other ground assigned for sustaining the court's order is that plaintiff did not act diligently. The court did not dismiss plaintiff's petition on this ground. Nevertheless, the contention may be answered briefly by saying that only three months had intervened between the time that plaintiff first learned of the satisfaction of her judgment and the date that her petition was filed. During this period her attorney, Vander-veld, was confined in various institutions and she could not get any information from him and had to investigate the facts through his former employees. This necessarily required some time, but it was not an unreasonable delay. To contend that this constituted a lack of diligence is absurd. The facts accounting for the delay are set forth in the petition and fully explain the period that intervened.

The order of the circuit court, denying plaintiff's motion to vacate and set aside the order satisfying plaintiff's judgment and annulling the satisfaction piece, is reversed with directions that the defendants be required to answer the petition that the cause proceed to a hearing upon the petition and answer.

REVERSED AND REMANDED WITH DIRECTIONS.
Sullivan, P. J., and Scanlan, J., concur.

CHARLES KALETA,
Appellee,

v.

ARCHER COAL AND MATERIAL
CO.,
Appellant.

Appeal from

Municipal Court

of Chicago.

287 I.A. 631⁴

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT:

Charles Kaleta brought a fourth class contract action in the municipal court upon one of a series of bonds issued by the defendant, Archer Coal and Material Co., and secured by a trust deed on improved real estate in Chicago. Attached to plaintiff's statement of claim was the bond, in the sum of \$500, on which the action was predicated, payable to the order of bearer, and due on August 1, 1932. Defendant's motion to strike plaintiff's statement of claim was denied, and thereupon defendant filed its affidavit of merits which was stricken on plaintiff's motion. An amended affidavit, subsequently filed by defendant, was likewise stricken, and, defendant having elected to stand thereby, judgment was entered for plaintiff, and this appeal followed.

The principal question presented for determination is whether a note or bond of this character is a negotiable instrument upon which an action at law can be predicated, and whether it is a distinct promise to pay money upon which recovery can be had by an individual bondholder, without reference to and notwithstanding the provisions of the trust deed securing it. The note contains on its face the following provision:

"For a more particular description of the covenants of the party of the first part, as well as a description of the mortgaged property, and the nature and extent of the security, the rights of the holder of the bonds and the terms and conditions upon which the bonds are issued and secured, and the method of payment thereof, reference is made to said trust deed."

Defendant argues that by this provision the holder of the instrument is sufficiently apprised that a further collateral agreement exists,

CHAS. KALWA
Applicant
v.
ARROW COAL AND SAWMILL
CO.
Respondent

Legal Fees
Respondent's

of Chicago

287 I.A. 631

MR. JUSTICE THOMAS delivered the opinion of the court:

The first clause of the fourth clause of the contract between the respondent and the appellant is a clause of bonds issued by the respondent, Arrow Coal and Sawmill Co., and secured by a trust deed on improved real estate in Chicago. Attached to plaintiff's statement of claim was the bond, in the sum of \$1000, on which the action was predicated, payable to the order of plaintiff, and on January 1, 1932. Defendant's motion to strike plaintiff's statement of claim was denied, and thereupon defendant filed its affidavit of defense, which was stricken on plaintiff's motion. An amended affidavit, subsequently filed by defendant, was likewise stricken, and defendant having elected to stand thereby, judgment was entered for plaintiff, and this appeal followed.

The principal question presented for determination is whether a note or bond of this character is a negotiable instrument upon which an action at law can be predicated, and whether it is a distinct promise to pay money when which negotiability can be lost by an individual bondholder, without prejudice to him notwithstanding the provisions of the trust deed creating it. The rule regarding on the face the following provisions:

"For a more particular description of the provisions of the first part, as well as a description of the nature and extent of the property, and the nature and extent of the security, the rights of the holder of the bond and the nature and extent of the interest which the bonds are intended to secure, and the nature of the interest which the bonds are intended to secure, see the 'Trust Deed' attached hereto, reference is made to said 'Trust Deed'."

Defendant argues that the provisions of the contract of the instrument is sufficiently explicit that a contract collateral agreement exists,

namely, the trust deed, which the owner is required to examine for a determination, not only of the nature and extent of the security but also of his rights as the holder of the bond and the terms and conditions upon which it was issued.

This question has frequently arisen on appeal (Continental National Bank & Trust Co. v. Chicago Builders Bldg. Co., 22 283 Ill. App. 64, 68; Chicago Title & Trust Co. v. Cohen, 284 Ill. App. 181, 191), and is fully discussed by the Supreme Court of Illinois in the case of Oswienza v. Wengler & Mandell, 358 Ill. 302. Plaintiff had there brought suit in the municipal court to recover the principal and interest due on four matured bonds of \$500 each, with interest. Under a stipulation of facts it appeared that the bonds contained on their face the following language:

"Said trust deed and this bond, as well as all the other bonds aforesaid, are to be taken and considered together as parts of one and the same contract. * * * Both principal and interest bear interest after maturity thereof at the rate of seven per cent. (7%) per annum and are payable in the manner described in the trust deed. * * * For a description of the mortgaged property and the nature and extent of the security, reference is made to said trust deed, to all of the provisions of which this bond and each coupon hereto attached are subject, with the same effect as if said trust deed were herein fully set forth."

The trust deed under which the bonds were issued contained the provision that

"No action at law or in equity shall be brought by or on behalf of the holder or holders of any bonds or coupons, whether or not the same be past due, except by the trustee or by the requisite number of bondholders acting in concert under the provisions of this section for the benefit of all bondholders."

It was there argued that since the bond and trust deed were made at the same time and as part of the same transaction, the universal rule of construction of contracts requires that they be read and construed as constituting a single instrument. The court pointed out, however, that there is a well recognized exception to this rule in cases of mortgages and notes, and that a note or bond is a distinct promise to pay money and the pledge of real

namely, the trust deed, which the owner is required to execute for a determination, not only of the nature and extent of the security but also of his rights as the holder of the bond and the terms and conditions upon which it was issued.

This question has frequently arisen on appeal (see-

Continental National Bank & Trust Co. v. Chicago Millers Bldg. Co.,

22 Ill. App. 3d, 84, 88; Chicago Title & Trust Co. v. Cohen, 184

Ill. App. 181, 191, and is fully discussed by the Supreme Court of

Illinois in the case of Quinn v. Weisner & Knappell, 228 Ill. 302.

Plaintiff had there brought suit in the municipal court to recover

the principal and interest on four matured bonds of \$500 each,

with interest. Under a stipulation of facts it appeared that the

bonds contained on their face the following language:

"Said trust deed and this bond, as well as all the other bonds aforesaid, are to be taken and considered together as parts of one and the same contract. * * * Both principal and interest bear interest after maturity thereof at the rate of seven per cent. (7%) per annum and are payable in the manner described in the trust deed. * * * For a recitation of the mortgaged property and the nature and extent of the security, reference is made to said trust deed, to all of the provisions of which this bond and each coupon hereto attached are subject, with the same effect as if said trust deed were herein fully set forth."

The trust deed under which the bonds were issued contained the

provision that

"No action at law or in equity shall be brought by or on behalf of the holder or holders of any bonds or coupons, whether or not the same be paid due, except by the trustee or by the representative number of bondholders acting in concert under the provisions of this section for the benefit of all bondholders."

It was there argued that since the bond and trust

deed were made at the same time and as part of the same transaction,

the universal rule of construction of contracts requires that they

be read and construed as constituting a single instrument. The

court pointed out, however, that there is a well recognized excep-

tion to this rule in cases of mortgages and notes, and that a note

estate to secure that promise is a different and distinct agreement, which ordinarily in nowise affects the promise to pay but gives a further remedy for failure to carry out that promise. The rule is well settled that the holder of a mortgage has three remedies: (1) He may sue at law on the note; (2) foreclose, and (3) bring ejectment for the condition broken,--and that all of these remedies may be sought concurrently unless a restriction is found in the note or trust deed. (Rohrer v. Deatherage, 336 Ill. 450).

The question presented in Oswienza v. Wengler & Mandell, *supra*, was whether there was in the bond language which might reasonably be said to have incorporated therein by reference the "no action" clause of the trust deed and thus limited the holders' right to the provisions of the trust deed. The court, after careful consideration of the provisions of the note and trust deed, held that, regardless of the question whether the bonds were negotiable, there was no language in the bonds which fairly included by reference the "no action" clause of the trust deed.

Plaintiff in this proceeding argues that notwithstanding the holding in the Oswienza v. Wengler & Mandell case, *supra*, the court inferentially held that incorporation by reference is valid and legal providing the language employed is distinct and unambiguous. We concur in this conclusion, but in the instant case there appears to be no provision in the trust deed similar to the so-called "no action" clause found in the Oswienza case, and therefore even if we should hold that the language used in the bond here sued upon was sufficiently clear and unambiguous to incorporate by reference the provisions of the trust deed, we find nothing in the trust deed itself which would take from the holder of the bond his right to sue at law. Aside from the provision of the note hereinbefore quoted, which has reference to the trust deed, the bond in

estate to secure that promise is a different and distinct agreement, which ordinarily is not affected by the promise to pay not given a further remedy for failure to carry out that promise. The rule is well settled that the holder of a mortgage has three remedies: (1) He may sue at law on the note; (2) foreclosure; and (3) bring ejectment for the condition broken,--and that all of these remedies may be sought concurrently unless a restriction is found in the note or trust deed. (Rohrer v. Westlake, 336 Ill. 450).

The question presented in Owens v. Wenger & Mandell, error, was whether there was in the bond language which might reasonably be said to have incorporated therein by reference the "no action" clause of the trust deed and thus limit the holders' right to the provisions of the trust deed. The court, after careful consideration of the provisions of the note and trust deed, held that, regardless of the question whether the bonds were negotiable, there was no language in the bonds which fairly included by reference the "no action" clause of the trust deed.

Plaintiff in this proceeding argues that notwithstanding the holding in the Owens v. Wenger & Mandell case, the court inferentially held that incorporation by reference is valid and legal providing the language employed is distinct and unambiguous. We concur in this conclusion, but in the instant case there appears to be no provision in the trust deed similar to the so-called "no action" clause found in the Owens case, and therefore even if we should hold that the language used in the bond here sued upon was sufficiently clear and unambiguous to incorporate by reference the provisions of the trust deed, we find nothing in the trust deed itself which would take from the holder of the bond his right to sue at law. Aside from the provision of the note hereinbefore quoted, which has reference to the trust deed, the bond in

question is an absolute, definite and unconditional promise to pay and as such plaintiff had a right to recover thereon unless there was some limitation in the trust deed to prevent him from so doing. We find no such limitation, and therefore plaintiff, as owner of the bond, had the right to sue at law, in addition to the security given to him under the provisions of the trust deed.

As an additional ground for reversal it is urged that seventy-five per cent of the bondholders had agreed to an extension of the indebtedness to August 1, 1939, and that plaintiff could not disregard this extension and sue on ~~his~~ his bond within the extended period. (Meek v. Electrical Engineering Equipment Company, 282 Ill. App. 616, is cited to support this contention, but we do not think it is applicable to the facts here presented. In that case the sole question, as stated by the court, was whether plaintiff "had the right to accelerate the time of payment of the principal of the bond." Inasmuch as the bond upon which plaintiff sued in this proceeding had matured, the question of acceleration did not enter into the case. It is conceded, of course, that there was never an extension of the due date of this particular bond, and the mere fact that 75% in amount of all the bonds then outstanding consented to an extension could not affect plaintiff's rights. The provision relied on refers only to the status of the lien of the trust deed with reference to bonds extended, and is a provision ordinarily found in trust deeds to protect the lien and security of the trust deed for the benefit of those bondholders extending the maturity date of the obligations provided the required amounts enter into the extension agreement. So far as we can ascertain, it has never been held that such an

question is an absolute, definite and unconditional promise to pay and as such plaintiff has a right to recover thereon unless there was some limitation in the trust deed to prevent him from so doing. We find no such limitation, and therefore plaintiff, as owner of the bond, had the right to sue at law, in addition to the security given to him under the provisions of the trust deed. As an additional ground for reversal it is urged that seventy-five per cent of the bondholders had agreed to an extension of the indebtedness to August 1, 1930, and that plaintiff could not disregard this extension and sue on his bond within the extended period. (Week v. Metropolitan Trust Company, 202 Ill. App. 618, is cited to support this contention, but we do not think it is applicable to the facts here presented. In that case the sole question, as stated by the court, was whether plaintiff "had the right to accelerate the time of payment of the principal of the bond." Inasmuch as the bond upon which plaintiff sued in this proceeding had matured, the question of acceleration did not enter into the case. It is conceded, of course, that there was never an extension of the date of this particular bond, and the mere fact that 75% in amount of all the bonds then outstanding consented to an extension could not affect plaintiff's rights. The provision relied on refers only to the status of the lien of the trust deed with reference to bonds extended, and is a provision originally found in trust deeds to protect the lien and security of the trust deed for the benefit of those bondholders extending the maturity date of the obligation provided the required amounts enter into the extension agreement. So far as we can ascertain, it has never been held that such an

extension, although it preserved the lien and security of the trust deed for the benefit of the bondholders entering into the agreement, has the effect of extending the maturity date of the bonds whose owners have not entered into the contract.

Holding as we do that nothing contained in the note or trust deed herein deprived plaintiff of his right to sue at law on the bond, in addition to any other rights given him as a bondholder under the trust deed, and that the extension agreement entered into by other bondholders was not binding on him, we think the Municipal Court properly entered judgment in plaintiff's favor, and the judgment is therefore affirmed.

AFFIRMED.

extension, although it preserved the lien and security of the trust
need for the benefit of the bondholders entering into the agreement,
and the effect of extending the maturity date of the bonds whose
owners have not entered into the contract.

Holding as we do that nothing contained in the note
or trust deed herein deprived plaintiff of his right to sue at law
on the bond, in addition to any other rights given him as a bond-
holder under the trust deed, and that the extension agreement
entered into by other bondholders was not binding on him, we think
the Municipal Court properly entered judgment in plaintiff's favor,
and the judgment is therefore affirmed.

AFFIRMED.

39190

MAX MAYRON, doing business as
Max Mayron & Company,
Appellee,

v.

IRWIN SCHULMAN et al.,
Appellants.

94
APPEAL FROM

INTERLOCUTORY INJUNCTION

OF CIRCUIT COURT, COOK

COUNTY

287 I.A. 632

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Defendants have appealed from an order of the circuit court denying their motion to dissolve an interlocutory injunction.

The complaint joining Irwin Schulman, J. W. Karsan, Ned Eisenberg and Harry Spungin as defendants alleges, in substance, that plaintiff is and for some twelve years past has been engaged in the sale of clothing on the installment plan in Chicago; that he employed defendants as salesmen and gave them specific routes and territories for solicitation and supplied them with a list of customers for that purpose; that defendants each signed a contract of employment with plaintiff providing, among other things, that defendants would not for a period of three years after the termination of their employment "solicit, sell or attempt to solicit or sell, directly or indirectly, for themselves or for others, or do business in any manner whatsoever with the customers apportioned to them on the installment route;" that plaintiff reposed trust and confidence in defendants as his employees and delivered to each of them a complete list or card index of his customers on the route assigned to them for solicitation; that notwithstanding the trust and confidence thus reposed in them by plaintiff, defendants betrayed same by making a complete list of plaintiff's customers

MAX MAYTON, doing business as
Max Mayton & Company,
Appellee,

v.

IRWIN SCHULMAN et al.,
Appellants.

APPEAL FROM

THE DISTRICT COURT

OF THE CIRCUIT COURT, CHICAGO

287 I.A. 632

MR. JUSTICE FRANK DELIVERED THE OPINION OF THE COURT.

Defendants have appealed from an order of the circuit court denying their motion to dissolve an interlocutory injunction. The complaint joining Irwin Schulman, I. W. Karpman, Ned Hirschberg and Harry Spornin as defendants alleges, in substance, that plaintiff is and for some twelve years past has been engaged in the sale of clothing on the installment plan in Chicago; that he employed defendants as salesmen and gave them specific routes and territories for solicitation and supplied them with a list of customers for that purpose; that defendants each signed a contract of employment with plaintiff providing, among other things, that defendants would not for a period of three years after the termination of their employment "solicit, sell or attempt to solicit or sell, directly or indirectly, for themselves or for others, or do business in any manner whatsoever with the customers apportioned to them on the installment route;" that plaintiff reposed trust and confidence in defendants as his employees and delivered to each of them a complete list or card index of his customers on the route assigned to them for solicitation; that notwithstanding the trust and confidence thus reposed in them by plaintiff, defendants betrayed same by making a complete list of plaintiff's customers

in the respective territories apportioned to them, with the intent and purpose of using these lists for their own benefit; that in the course of the performance of their duties as salesmen, defendants obtained knowledge and information pertaining to these customers and now each has a complete list in his possession, taken from plaintiff's books and records; that they are now soliciting business and calling upon plaintiff's customers in violation of their contracts, as set forth in the complaint and in betrayal of the trust and confidence reposed in them by plaintiff during the period of their employment; that in soliciting customers, representations are made which lead them to believe that defendants and each of them are still working for plaintiff, and thereby defendants obtain contracts and business from plaintiff's customers which they turn over to his competitors.

On filing the complaint, due notice was served upon all the defendants, who appeared in court July 22, 1936, and after two continued hearings and arguments had before the court, defendants were granted leave to file their joint and several answer and on the same day the restraining order was entered. Thereafter, August 4, 1936, defendants appeared before another judge then filling an emergency assignment during the summer vacation, and moved for a dissolution of the restraining order. Arguments were heard by the court, based upon the allegations of the complaint and the averments of the answer, with supporting affidavits, resulting in the order denying defendants' motion to dissolve the injunction.

By their joint and several answer defendants neither admit nor deny that the written contract attached to the complaint was executed by defendants or any of them; they admit that they were employed by plaintiff as his solicitors; deny that plaintiff delivered to each of them a complete list or card index of his

in the respective territories apportioned to them, with the intent and purpose of using these lists for their own benefit; that in the course of the performance of their duties as salesman, defendants obtained knowledge and information pertaining to these customers and now each has a complete list in his possession, taken from plaintiff's books and records; that they are now soliciting business and calling upon plaintiff's customers in violation of their contracts, as set forth in the complaint and in betrayal of the trust and confidence reposed in them by plaintiff during the period of their employment; that in soliciting customers, representations are made which lead them to believe that defendants and each of them are still working for plaintiff, and thereby defendants obtain contracts and business from plaintiff's customers which they turn over to his competitors.

On filing the complaint, due notice was served upon all

the defendants, who appeared in court July 22, 1936, and after two continued hearings and arguments had before the court, defendants were granted leave to file their joint and several answer

and on the same day the restraining order was entered. Thereafter, August 4, 1936, defendants appeared before another judge then filling an emergency assignment during the summer vacation, and moved for a dissolution of the restraining order. Arguments were heard by the court, based upon the allegations of the complaint and the ver-

ments of the answer, with supporting affidavits, resulting in the order denying defendants' motion to dissolve the injunction. By their joint and several answer defendants neither admit nor deny that the written contract attached to the complaint was executed by defendants or any of them; they admit that they were employed by plaintiff as his solicitors; deny that plaintiff delivered to each of them a complete list or card index of his

alleged customers; deny that they were given specific routes, but state on the contrary that they were in a position to obtain business wherever it might be found; deny that they or any of them made a complete list, or any list, of plaintiff's customers; deny they are now soliciting business and calling upon plaintiff's customers and that the persons specifically mentioned in the complaint are customers of plaintiff; deny that defendants, or any of them, are soliciting business from any of the customers of plaintiff or that any of these customers are being called on by defendants "in any manner or form;" deny that defendants or any of them are soliciting the so-called customers of plaintiff or that they have led any of these so-called customers to believe that they are acting for or on behalf of plaintiff, deny that they made copies of the lists of plaintiff's customers or patrons, or carried away any of plaintiff's records, or that any of plaintiff's lists are being used in securing the patronage of plaintiff's customers.

After the averment and denial of the various matters hereinbefore set forth, the answer states that the contracts set forth in the complaint are vague, indefinite, insufficient and incapable of specific performance; that the so-called customers of plaintiff are not trade secrets within the contemplation of law, and therefore are not entitled to the protection of a court of equity; and that the negative covenants contained in the contracts are unfair, unduly oppressive and incapable of enforcement.

From the pleadings it appears that the complaint is founded upon the twofold theory that (1) defendants were violating a negative covenant contained in the contract; and (2) that, while employed by plaintiff and prior to the termination of their employment, defendants secured lists and records of plaintiff's customers for the purpose of solicitation, used the same in violation of their trust and turned the business thus obtained over to plaintiff's competitors,

alleged customer; deny that they were given specific names, but state on the contrary that they were in a position to obtain business whenever it might be found; deny that they or any of them made a complete list, or any list, of plaintiff's customers; deny that they are now soliciting business and calling upon plaintiff's customers and that the persons specifically mentioned in the complaint are customers of plaintiff; deny that defendants, or any of them, are soliciting business from any of the customers of plaintiff or that any of these customers are being called on by defendants "in any manner or form;" deny that defendants or any of them are soliciting the so-called customers of plaintiff or that they have had any of these so-called customers to believe that they are acting for or on behalf of plaintiff, deny that they made copies of the lists of plaintiff's customers or patrons, or carried away any of plaintiff's records, or that any of plaintiff's lists are being used in securing the patronage of plaintiff's customers.

After the averment and denial of the various matters hereinbefore set forth, the answer states that the contracts set forth in the complaint are vague, indefinite, incomplete and incapable of specific performance; that the so-called customers of plaintiff are not trade secrets within the contemplation of law, and therefore are not entitled to the protection of a court of equity; and that the negative covenants contained in the contracts are invalid, unenforceable and incapable of enforcement.

From the pleadings it appears that the complaint is founded upon the twofold theory that (1) defendants were violating a negative covenant contained in the contract; and (2) that, while employed by plaintiff and prior to the termination of their employment, defendants secured lists and records of plaintiff's customers for the purpose of solicitation, used the same in violation of their trust

for the purpose of destroying plaintiff's good will and business.

The first of these propositions, namely, that defendants were guilty of violating the negative covenant contained in the written agreement set forth in the complaint, was evidently considered only incidentally by the chancellor. The denial of the motion to dissolve was apparently based on the charges and allegation of facts made in the complaint and the denial thereof by defendants. A careful examination of the pleadings leads to the conclusion that plaintiff set forth a sufficient cause of action against defendants which, if taken to be true, would entitle him to a temporary restraining order pending the outcome of the litigation. Defendants' denial of the charges is no stronger than the assertions made by plaintiff. Under the circumstances it was not improvident for the court to issue the injunction and to refuse the motion to dissolve it, and thus preserve the status of the parties until a full hearing could be had. Since defendants categorically denied substantially all the charges made, we fail to see how they could be injured by a temporary restraining order. In determining whether a temporary injunction should issue and remain in force to protect a plaintiff's rights, the court will consider the relative injury that the parties may suffer. In view of defendants' denial of the charges made, it seems evident that defendants will not be injured by allowing the injunction to stand, pending the outcome of the litigation. On the other hand, if the charges be taken as true, plaintiff would be irreparably damaged by a refusal of the court to preserve the status of the parties and allow defendants to continue their unfair practices and the impairment of the good will of his business. The duty of the chancellor under the circumstances is well settled.

(Moroney v. Allman, 271 Ill. App. 336, 345-46; Baird v. Community

for the purpose of destroying plaintiff's good will and business.
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were guilty of violating the negative covenant contained in the
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action against defendant which, if taken to be true, would entitle
him to a temporary restraining order pending the outcome of the
litigation. Defendant's denial of the charges is no stronger than
the assertions made by plaintiff. Under the circumstances it was
not imprudent for the court to issue the injunction and to refuse
the motion to dissolve it, and thus preserve the status of the
parties until a full hearing could be had. Since defendant
categorically denied substantially all the charges made, we will
to see how they could be injured by a temporary restraining order.
In determining whether a temporary injunction should issue and
remain in force to protect a plaintiff's rights, the court will
consider the relative injury that the parties may suffer in
view of defendant's denial of the charges made, it being evident
that defendant will not be injured by allowing the injunction to
stand, pending the outcome of the litigation. On the other hand,
if the charges be taken as true, plaintiff would be irreparably
damaged by a refusal of the court to preserve the status of the
parties and allow defendant to continue their unfair practices
and the impairment of the good will of his business. The duty
of the chancellor under the circumstances is well settled.

High School Dist., 304 Ill. 526, 529.) See, also, Daigger & Co. v. Kraft, 281 Ill. App. 548, 553, where this court approved issuance of preliminary injunction, without notice to defendants, restraining use of plaintiff's customers' lists by defendant.

Since the hearing evidently turned on the sufficiency of the bill, based upon the charges made, and the weight to be accorded the denial of defendants, it was proper for the court to deny the motion for dissolution of the injunction. The pleadings create issues of fact to be heard either by the court or a master, and pending that hearing plaintiff is entitled to the protection of a restraining order. For these reasons, the order of the circuit court is affirmed.

ORDER AFFIRMED.

Sullivan, P. J., and Scanlan, J., concur.

High School Grad., 324 Ill. 222, 229. See, also, Boyd v. State,
v. Kurtz, 281 Ill. App. 523, 525, where this court approved
issuance of preliminary injunction, without notice to defendant,
restraining use of plaintiff's accounts, lists by defendant.
Since the hearing actually turned on the sufficiency of
the bill, based upon the charges made, and the right to be awarded
the denial of defendant, it was proper for the court to deny the
motion for dissolution of the injunction. The plaintiff's estate
issues of fact to be heard either by the court or a master, and
pending that hearing plaintiff is entitled to the protection of
a restraining order. For these reasons, the order of the circuit
court is affirmed.

C. L. H. H. H. H.

William, P. J., and Newman, J., concur.

38466

THE FIRST NATIONAL BANK
OF CHICAGO, as Trustee,
Appellant,

v.

MOSES BUSH et al.,
Appellees.

95
APPEAL FROM CIRCUIT COURT,
COOK COUNTY.

287 I.A. 632²

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Plaintiff filed a bill to foreclose a trust deed given to secure three principal promissory notes aggregating \$18,000 upon which \$500 had been paid. A decree was entered finding that there was due complainant \$20,780.33, together with master's and solicitors' fees in the sum of \$600, and ordering that unless within three days from the date of the decree the amounts due complainant were paid the premises in question should be sold by the master in chancery at public auction for cash to the highest and best bidder. A sale was held in accordance with the terms of the decree and the property was sold to plaintiff for \$18,000. The master made a report that there was a deficiency of \$4,263.56 and recommended that execution issue against defendants Moses Bush and Dora Bush, who were personally liable for the debt. Thereafter the matter came before the chancellor upon a motion by plaintiff to approve the master's report of sale and for a deficiency decree. Defendants' solicitor offered to show by evidence that the property was worth not less than \$25,000 and thereupon the chancellor heard testimony, introduced by defendants and plaintiff, as to the value of the property. Edwin H. Manasse, called by defendants, stated

THE FIRST NATIONAL BANK
OF CHICAGO, as Trustee,
Appellant,

v.

MOSES BUSH et al.,
Appellees.

APPEAL FROM CIRCUIT COURT,

COOK COUNTY.

287 I.A. 632

MR. JUSTICE SCAMMAN DELIVERED THE OPINION OF THE COURT.

Plaintiff filed a bill to foreclose a trust deed given to secure three principal promissory notes aggregating \$18,000 upon which \$300 had been paid. A decree was entered finding that there was due complainant \$18,780.33, together with master's and solicitors' fees in the sum of \$600, and ordering that unless within three days from the date of the decree the amounts due complainant were paid the premises in question should be sold by the master in chancery at public auction for cash to the highest and best bidder. A sale was held in accordance with the terms of the decree and the property was sold to plaintiff for \$18,000. The master made a report that there was a deficiency of \$780.33 and recommended that execution issue against defendants Moses Bush and Dora Bush, who were personally liable for the debt. Thereafter the matter came before the chancellor upon a motion by plaintiff to approve the master's report of sale and for a deficiency decree. Defendants' solicitor offered to show by evidence that the property was worth not less than \$25,000 and thereupon the chancellor heard testimony, introduced by defendants and plaintiff, as to the value of the property. Edwin H. Manasse, called by defendants, stated

that the replacement value of the property was \$30,123.40, its fair cash market value \$25,641, its value as an income producing investment was not over \$21,000, and that the gross rentals from the property during the period of redemption should amount to \$2,376. Jacob Taff, a witness for defendants, fixed the replacement value of the property at \$33,403. Defendant Moses Bush testified that the cost of the building and garage was \$32,000 and that he thought he paid \$2,500 for the lot. Marvin O. Flom, a witness for plaintiff, testified that the present fair cash market value of the premises was \$14,000; that the full value of the property placed by the assessor for tax purposes was \$12,767. Counsel for defendants argued that in view of the testimony plaintiff should not be allowed any deficiency, and cited Levy v. Broadway-Carmen Bldg. Corp., 278 Ill. App. 293, in support of his position. Counsel for plaintiff insisted that the master's report be confirmed. The chancellor stated that on the basis of rentals that would probably accrue during the period of redemption plaintiff "ought to clean up \$2,943," and that therefore he would "cut down" the deficiency recommended by the master to \$2,376. The chancellor thereupon entered the following order:

"* * * That the said Master has in every respect proceeded in due form of law and in accordance with the terms of said decree and that said sale was fairly made, and the court being fully advised in the premises, Doth Order, Adjudge and Decree that the proceedings of sale and report of said Master be and the same are hereby approved and confirmed, and it further appearing to the court from said report that the proceeds of said sale are insufficient to pay the amount due the complainant under said decree, together with the fees and disbursements and commissions of the said Master and the costs of this proceeding, and that there is still a deficiency in the amount due the complainant and that the defendants, Moses Bush and Dora Bush, his wife, are personally liable to the complainant therefor.

"It Is Ordered, Adjudged and Decreed that the defendants, Moses Bush and Dora Bush, his wife, pay to the complainant the amount of said deficiency, to-wit, the sum of Two Thousand Three Hundred Seventy-Six Dollars, with interest thereon from the date of said Master's sale, to-wit, the 15th day of November, 1934, and that the complainant have execution therefor.

that the replacement value of the property was \$30,123.40, its fair cash market value \$25,641, its value as an income producing investment was not over \$1,000, and that the gross rentals from the property during the period of redemption should amount to \$2,376. Jacob Telf, a witness for defendants, fixed the replacement value of the property at \$25,403. Defendant Moses Bush testified that the cost of the building and garage was \$22,000 and that he thought he paid \$2,500 for the lot. Marvin O. Wilson, a witness for plaintiff, testified that the present fair cash market value of the premises was \$14,000; that the full value of the property placed by the assessor for tax purposes was \$2,707. Counsel for defendants argued that in view of the testimony plaintiff should not be allowed any deficiency, and cited Lavy v. Broadway-Canaan Bldg. Corp., 278 Ill. App. 203, in support of his position. Counsel for plaintiff insisted that the master's report be confirmed. The chancellor stated that on the basis of rentals that would properly accrue during the period of redemption plaintiff "ought to clean up \$2,943," and that therefore he would "cut down" the deficiency recommended by the master to \$2,376. The chancellor thereupon entered the following order:

"* * * That the said master has in every respect proceeded in due form of law and in accordance with the terms of said decree and that said sale was fairly made, and the same being fully advised in the premises, both Order, Judgment and Decree that the proceedings of sale and report of said master be and the same are hereby approved and confirmed, and it further appearing to the court from said report that the proceeds of said sale are insufficient to pay the amount due the complainant under said decree, together with the less and disbursements and commissions of the said master and the costs of this proceeding, and that there is still a deficiency in the amount due the complainant, and that the defendants, Moses Bush and Lora Bush, his wife, are personally liable to the complainant therefor.

"It is Ordered, Adjudged and Decreed that the defendants, Moses Bush and Lora Bush, his wife, pay to the complainant the amount of said deficiency, to-wit, the sum of Two Thousand Three Hundred Seventy-six Dollars, with interest thereon from the date of said master's sale, to-wit, the 15th day of November, 1937, and that the complainant have execution therefor.

"It Is Further Ordered that the said complainant shall have a first and prior lien upon the rents, issues and profits of said premises during the statutory period of redemption for the satisfaction of said deficiency decree, and that the gross rentals so received from said premises during the entire period of redemption shall be applied in satisfaction of said deficiency."

The chancellor entered a further order appointing a receiver for the premises, which order contained the following: "That Moses Bush be allowed to occupy his apartment rent-free during the period of redemption, so long as the other two apartments on said premises remain rented."

Plaintiff has appealed from the first order and from that part of the second order wherein the chancellor allowed Moses Bush "to occupy his apartment rent-free during the period of redemption, so long as the other two apartments on said premises remain rented." Plaintiff contends that no case can be cited that sustains the procedure adopted by the chancellor upon the hearing of plaintiff's motion to approve the master's report of sale and for a deficiency decree. Defendants assert that Levy v. Broadway-Carmen Bldg. Corp., supra (decided by this branch of the court), supports the action of the chancellor. The chancellor and counsel for defendants misinterpreted the opinion in that case. There the trial court found that the fair and reasonable market value of the mortgaged premises calculated according to reproduction cost of the building and value per front foot of the land was \$77,400, that its fair and reasonable market leasing value was \$80,000, that the amount due to the mortgagee was \$71,508.45, and that complainant-mortgagee, who was the only bidder at the master's sale of the premises, bid in the property at \$50,000. We held that the trial court, upon complainant's refusal to release the entire unpaid indebtedness, was justified in refusing to confirm the sale and in ordering a resale of the premises for not less than a stated sum. In the instant case no upset price had been fixed in the decree ordering a sale of the premises. The chancellor,

"It is further ordered that the said complainant shall have a first and prior lien upon the rents, issues and profits of said premises during the statutory period of redemption for the satisfaction of said deficiency decree, and that the gross rents so received from said premises during the entire period of redemption shall be applied in satisfaction of said deficiency."

The chancellor entered a further order appointing a receiver for the premises, which order contained the following: "That Moses Bush be allowed to occupy his apartment rent-free during the period of redemption, so long as the other two apartments on said premises remain rented."

Plaintiff has appealed from the first order and from that part of the second order wherein the chancellor allowed Moses Bush "to occupy his apartment rent-free during the period of redemption, so long as the other two apartments on said premises remain rented." Plaintiff contends that no case can be cited that sustains the procedure adopted by the chancellor upon the hearing of Plaintiff's

motion to approve the master's report of sale and for a deficiency decree. Defendants assert that Lavy v. Broadway-Garman Bldg. Corp., (decided by this branch of the court), supports the action of the chancellor. The chancellor and counsel for defendants maintained the opinion in that case. There the trial court found that the fair and reasonable market value of the mortgaged premises calculated according to reproduction cost of the building and value per front foot of the land was \$77,400, that its fair and reasonable market leasing value was \$80,000, that the amount due to the mortgagee was \$71,508.45, and that complainant-mortgagee, who was the only bidder at the master's sale of the premises, bid in the property at \$50,000. We held that the trial court, upon complaint in replevin to release the entire unpaid indebtedness, was justified in refusing to confirm the sale and in ordering a resale of the premises for not less than a stated sum. In the instant case no upset price has been stated to the decree ordering a sale of the premises. The chancellor,

under the decision in the Levy case, had the right to conduct a hearing to establish the value of the property, and if it appeared that there was no competitive bidding at the sale, due to the great economic depression, and that the bid of plaintiff was grossly inadequate, he might require, as a condition to confirmation, that the fair value of the property be credited upon the foreclosure judgment; but in such event the option should have been given plaintiff to accept or reject the said condition. If the option had been given plaintiff and rejected by him, the chancellor might then have ordered a resale of the property. No such procedure was followed. The chancellor confirmed the sale but reduced the amount of the deficiency to a sum that he thought would be "wiped out" through the gross rentals that might be received during the period of redemption. His action in that regard constitutes reversible error.

Plaintiff justly complains that that part of the order appointing a receiver, wherein the receiver is ordered to give Moses Bush the right to occupy an apartment without payment of rent, is a clear violation of plaintiff's rights. (See Greenebaum v. McCormick, 273 Ill. App. 126, and Bohrer v. Deatherage, 336 Ill. 450.)

The judgment order of the Circuit court of Cook county confirming the master's report and for a deficiency decree in the amount of \$2,376, is reversed; and that part of the order appointing a receiver wherein the chancellor ordered "that Moses Bush be allowed to occupy his apartment rent-free during the period of redemption, so long as the other two apartments

on said premises remain rented," is also reversed; and the cause is remanded for further proceedings not inconsistent with this opinion.

JUDGMENT ORDER CONFIRMING MASTER'S REPORT AND FOR DEFICIENCY DEGREE OF \$2,376, AND CERTAIN PART OF ORDER APPOINTING RECEIVER, REVERSED; AND CAUSE REMANDED WITH DIRECTIONS.

Sullivan, P. J., and Friend, J., concur.

Since the above opinion was written the Supreme court has filed an opinion in Levy v. Broadway-Carmen Bldg. Corp., SUPRA. Should the petition for a rehearing be denied in that case the trial court, upon further proceedings in the instant case, will, of course, follow the ruling of the Supreme court in the Levy case.

38600

In re Estate of JOHN W. MARSHALL,
Deceased.

CYRUS S. EATON and SHELDEN E. KLINE,
Copartners, doing business as
OTIS & CO.,

Appellees,

v.

HELEN M. SHADDOCK, as Administratrix
of the Estate of JOHN W. MARSHALL,
Deceased,

Appellant.

APPEAL FROM

CIRCUIT COURT

OF COOK COUNTY.

287 I.A. 632³

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

In a trial by the court without a jury there was a finding and judgment in favor of plaintiffs in the amount of \$3,603.14. Defendant appeals.

Plaintiffs were stockbrokers and John W. Marshall had a marginal trading account with them for over four years. The account involved a great many transactions. Marshall dealt with plaintiffs through William L. Price and in connection therewith gave to plaintiffs the following trading authorization:

"TRADING AUTHORIZATION WITH PRIVILEGE TO WITHDRAW
MONEY AND/OR SECURITIES

"Messrs. Otis & Company

"Dear Sirs:

"I hereby authorize Wm. L. Price to buy, sell and trade in, for my account and risk and in my name, stocks, bonds and any other securities and/or commodities on margin or otherwise and in accordance with your terms and conditions as provided in the Customer's Contract entered into by me on this date; and I hereby agree to indemnify and hold you harmless from and to promptly pay you on demand any and all losses arising therefrom or debit-balance due thereon. You will kindly follow his instructions in every respect concerning my account with you, and make payments of moneys and deliveries of securities to him or otherwise as he may order and direct. In all matters and things aforementioned he is authorized to act for me and in my behalf in the same manner and with

In re Estate of JOHN W. MARSHALL,
Deceased.

CYNUS S. MATON and SMITH M. KIRK,
Copartners, doing business as
OTIS & CO.,
Appellees,

v.

WILLIAM M. SHADOCK, as Administrator
of the Estate of JOHN W. MARSHALL,
Deceased,
Appellant.

MR. JUSTICE SCAMMAN DELIVERED THE OPINION OF THE COURT.

In a trial by the court without a jury there was a finding
and judgment in favor of plaintiffs in the amount of \$3,603.14.
Defendant appeals.
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marginal trading account with them for over four years. The account
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tiffs the following trading authorization:

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"Messrs. Otis & Company

"Dear Sirs:

"I hereby authorize Mr. L. Price to buy, sell and trade
in, for my account and risk and in my name, stocks, bonds and any
other securities and/or commodities on margin or otherwise and in
accordance with your terms and conditions as provided in the
Contract entered into by me on this date; and I hereby
agree to indemnify and hold you harmless from and to promptly pay
you on demand any and all losses arising from or by reason of
due thereon. You will kindly follow his instructions in every
respect concerning my account with you, and make payments of money
and deliveries of securities to him or otherwise as he may order
and direct. In all matters and things aforementioned he is author-

APPEAL FROM
CIRCUIT COURT
OF COCK COUNTY.

387 I.A. 632

the same force and effect as I might or could do.

"I hereby waive notification to me of any of the aforementioned transactions and delivery of any statements, notices or demands pertaining thereto and hereby ratify any and all transactions heretofore or hereafter made by him on or for my account.

"This authorization is a continuing one and shall remain in full force and effect until receipt from me of written notice of my revocation thereof."

"JOHN W. MARSHALL

"Dated May 22, 1928."
(Italics ours.)

Plaintiffs never received from Marshall a written notice of revocation of the authorization. Marshall died November 16, 1931, and the claim of plaintiffs against his estate is based on the state of his account. The correctness of the account was not questioned. During the latter part of 1930 and the first part of 1931 plaintiffs made repeated requests, by telegrams and letters, upon Marshall to put up adequate margin or the securities in the account would be sold. The securities so held at the time in question were 100 shares General Water Works and Electric Corporation 7% preferred stock, 50 shares United Retail Chemical Voting Trust Certificates "A," 50 shares United Retail Chemical Voting Trust Certificates "B," and 5/40 share Utilities Power & Light. The fractional share was subsequently sold. These securities were what is known as unlisted or "over-the-counter" securities. None save the fractional share was sold. Price testified that after a conference, in reference to the account in question, with Marshall, Miss Emma Marshall and Mr. Glover, held in the office of Wilsey & Company, where he was employed as a salesman, he went to plaintiff's office with Mr. Glover and told Stanley Morrill, the resident manager of plaintiffs' business, that Mr. Glover was there to clean up the account, and for Morrill "to go ahead and close out the account." Glover testified that this conference at the office of Wilsey & Company took place in the month of April or May, 1931, and that he went to plaintiffs'

the same force and effect as I might or could do.

"I hereby waive notification to me of any of the above-mentioned transactions and delivery of any statements, notices or demands pertaining thereto and hereby ratify and affirm transactions heretofore or hereafter made by him on or for my account.

"This authorization is a continuing one and shall remain in full force and effect until receipt from me of written notice of my revocation thereof."

"JOHN W. MARSHALL

"Dated May 22, 1938."
(Initials only.)

Plaintiffs never received from Marshall a written notice of revocation of the authorization. Marshall died November 16, 1931, and the claim of plaintiffs against his estate is based on the state of his account. The correctness of the account was not questioned. During the latter part of 1930 and the first part of 1931 plaintiffs made repeated requests, by telegrams and letters, upon Marshall to put up adequate margin or the securities in the account would be sold. The securities so held at the time in question were 100 shares General Motor Corp. and Electric Corporation & preferred stock, 50 shares United Retail Chemical Trading Trust Certificates "A," 50 shares United Retail Chemical Trading Trust Certificates "B," and 240 shares Utilitia Power & Light. The fractional shares was subsequently sold. These securities were what is known as "unlisted or 'over-the-counter' securities. Some have the fractional share was sold. Price testified that after a conference, in reference to the account in question, with Marshall, Miss Emma Marshall and Mr. Glover, held in the office of Wiley & Company, where he was employed as a salesman, he went to plaintiff's office with Mr. Glover and sold Stanley Merrill, the resident manager of plaintiff's business, that Mr. Glover was there to clean up the account, and for Merrill "to go ahead and close out the account." Glover testified that this conference at the office of Wiley & Company took place

office the morning after the conference.

Defendant contends that it was the duty of plaintiffs to close the account when Price directed them to do so; that at the time the order to close was given the securities that plaintiff held could have been sold for an amount more than sufficient to pay the account in full, "but even if the securities could not have been sold for enough to pay the account in full, it was nevertheless the duty of plaintiffs to have sold for whatever they could have realized." At the conclusion of the evidence and after the trial court had heard arguments of counsel, he stated that he found from the evidence that Price had authority from Marshall to close out the account and that he notified plaintiffs "to close out the account;" that the material question in the case ^{was} Did plaintiffs, after they had been notified to close out the account, use reasonable diligence to comply with the notification? The court held that the burden was upon defendant to prove that plaintiffs had not used due diligence to sell the stock and that defendant had failed to show that there was a market for the stock. Defendant contends that the court erred in holding that the burden of proof was on defendant to prove that there was a market for the stock. We deem it unnecessary to determine this contention, as we are satisfied that the preponderance of the evidence shows there was no market for the securities and that plaintiffs were unable to dispose of the same although they made repeated efforts to do so. Not only the testimony offered by plaintiffs but testimony offered by defendant sustains plaintiffs' theory of fact that they were unable to sell the stock although they tried for a long period of time to procure a buyer for the same. As the trial court stated, the testimony of George Gallagher, called by defendant, that Wilsey

office the morning after the conference.

Defendant contends that it was the duty of plaintiffs to

close the account when Price directed them to do so; that at the

time the order to close was given the securities that plaintiffs

held could have been sold for an amount more than sufficient to

pay the account in full, "but even if the securities could not

have been sold for enough to pay the account in full, it was never-

theless the duty of plaintiffs to have sold for whatever they could

have realized." At the conclusion of the evidence and after the

trial court had heard arguments of counsel, he stated that he found

from the evidence that Price had authority from plaintiffs to close

out the account and that he notified plaintiffs "to close out the

account"; that the material question in the case ^{was} did plaintiffs,

after they had been notified to close out the account, use reason-

able diligence to carry out the notification? The court held

that the burden was upon defendant to prove that plaintiffs had

not used due diligence to sell the stock and that defendant had

failed to show that there was a market for the stock. Defendant

contends that the court erred in holding that the burden of proof

was on defendant to prove that there was a market for the stock.

It seems unnecessary to determine this contention, as we are

satisfied that the preponderance of the evidence shows there was

no market for the securities and that plaintiffs were unable to

dispose of the same although they made repeated efforts to do so.

Not only the testimony offered by plaintiffs but testimony offered

by defendant sustains plaintiffs' theory of fact that they were

unable to sell the stock although they tried for a long period of

time to procure a buyer for the same. As the trial court stated,

the testimony of George Gallagher, called by defendant, that they

& Company bought possibly 100 shares of General Water Works and Electric 7% preferred stock altogether in the months of April, May and June, 1931, is "very vague" and unsatisfactory. The testimony of defendant's witness Price conclusively shows that Gallagher's testimony is entitled to little, if any, weight. Defendant offered no evidence to prove that United Retail Chemical Voting Trust Certificates had any market value or could have been sold by plaintiffs. Price testified that these certificates had been "washed out some time before that on merger." Wilsey & Company were in the syndicate that brought out the issue of General Water Works and Electric Corporation 7% preferred stock and sold it to the public. At the time in question the country was experiencing the greatest depression in its history. Price, the intimate personal friend and agent of the deceased, worked for Wilsey & Company, dealers in securities. He testified that he was trying through a trader to get a market for the General Water Works and Electric stock; that the Marshall account with plaintiffs "was stagnant and you could not move the stocks that were in there," and that General Water Works and Electric stock "was not regular salable stock." The letter that Price wrote the attorneys for plaintiffs on September 1, 1931, states that he was trying to get a market on the 100 shares of General Water Works and Electric 7% preferred stock; that at that time there was no bidding on the stock but that he was hoping that the situation would be cleared up shortly, and that there was no way the balance of the account could be paid until the collateral could be sold. As plaintiffs argue, it was to their interest to sell the stock, if they could do so. Defendant's evidence tends to show that at the time in question brokers' offices were crowded with customers who were complaining that the brokers had sold their margin securities too hastily. The only inference to be drawn from all of the testimony is that the stock

only inference to be drawn from all of the testimony is that the stock
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 to get a market for the General Electric and Electric stock; that
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 friend and agent of the deceased, worked for Alsey & Company, deal-
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 Defendant offered no evidence to prove that United States Chemical
 Gallagher's testimony is entitled to little, if any, weight.
 testimony of defendant's witness Price conclusively shows that
 May and June, 1931, is "very vague" and unsatisfactory. The
 Electric V% preferred stock altogether in the months of April,
 & Company bought possibly 100 shares of General Electric stock and

in question is worthless.

After a careful consideration of the evidence in the case we are satisfied that the great preponderance of the evidence shows that plaintiffs were unable to find a market for the stock.

The judgment of the Circuit court of Cook county is affirmed.

JUDGMENT AFFIRMED.

Sullivan, P. J., and Friend, J., concur.

in question is worthless.

After a careful consideration of the evidence in the case we are satisfied that the great preponderance of the evidence shows that plaintiffs were unable to find a market for the stock. The judgment of the Circuit Court of Cook County is

affirmed.

JUDGMENT AFFIRMED.

Gallivan, P. J., and Friend, J., concur.

38721

BENJAMIN D. FROST,
Appellee,

v.

IVAN BIGGAR, as Receiver
of CENTRAL CHICAGO GARAGES,
INCORPORATED,
Appellant.

97
APPEAL FROM SUPERIOR
COURT OF COOK COUNTY.

287 I.A. 632⁴

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Benjamin D. Frost sued Ivan Biggar, as receiver of Central Chicago Garages, Incorporated. Dorothy Fitch (then Dorothy Lawrence) also sued the same defendants and as the two cases grew out of one accident they were consolidated for trial by order of court. At the close of plaintiffs' evidence the court instructed the jury to find all of the defendants save Ivan Biggar, as Receiver of Central Chicago Garages, Incorporated, not guilty. The jury returned a verdict finding Ivan Biggar, as receiver (hereinafter called defendant), guilty and assessing plaintiff Benjamin D. Frost's damages in the sum of \$22,500. The jury also returned a verdict finding defendant guilty and assessing plaintiff Dorothy Fitch's damages at the sum of \$3,000. Judgment was entered upon both verdicts. Defendant appeals but did not ask for a supersedeas.

Defendant contends that "the plaintiff, Benjamin D. Frost, was guilty of contributory negligence as a matter of law and the trial court should have directed a verdict for the defendant at the close of the plaintiff's evidence. The trial court also erred in overruling defendant's motion for a judgment

1874

BENJAMIN D. TRUST,
Appellee,

v.

IVAN BIGNARD, as Receiver
of TRUST'S ESTATE,
Appellant.

287 I.A. 632

MR. JUSTICE EDWARD TULLOCH, JUDGE OF THE COURT.

Benjamin D. Trust was Ivan Bignard, as receiver of
Central Chicago Street, Incorporated, formerly known as the
Chicago Street, also was the same defendant and as the
two cases were out of the court they were consolidated for
trial by order of court. At the close of plaintiff's evidence
the court instructed the jury to find all of the defendants
were Ivan Bignard, as receiver of Central Chicago Street,
Incorporated, his ally. The jury returned a verdict finding
Ivan Bignard, as receiver (hereinafter called defendant), guilty
and assessing plaintiff Benjamin D. Trust's damages in the sum
of \$27,800. The jury also returned a verdict finding defendant
guilty and assessing plaintiff Trust's damages in the
sum of \$5,000. Judgment was entered upon both verdicts.
Defendant appeals but did not ask for a rehearing.
Defendant contends that the plaintiff, Benjamin D.
Trust, was guilty of contributory negligence as a matter of
law and the trial court should have directed a verdict for the
defendant at the close of the plaintiff's evidence. The trial
court also erred in overruling defendant's motion for a judgment

non obstante veredicto." Defendant makes the same contention as to plaintiff Dorothy Fitch. Defendant did not stand by his motion to direct a verdict for defendant at the close of plaintiffs' evidence but proceeded to introduce testimony in his behalf. By this course defendant waived objection to the overruling of his motion at the close of plaintiffs' evidence, and in passing upon the contention that both plaintiffs were guilty of contributory negligence as a matter of law, plaintiffs would have the right to insist that all of the evidence be considered. But if the instant contention were determined from an examination of plaintiffs' evidence alone, it would make no difference in our ruling.

The accident occurred at the intersection of Wacker drive and Wabash avenue, about 2 o'clock A. M., November 27, 1932. Wabash avenue and Wacker drive intersect at right angles, but Wacker drive east of Wabash avenue runs in a southeasterly direction toward Wabash avenue. North of the intersection is a bridge, 346 feet in length, that crosses the Chicago river. Defendant's garage is located north of the river and to the west of Wabash avenue. Wabash avenue from curb to curb is 60 feet wide. Wacker drive at the intersection is about 150 feet wide. There are double street car tracks on Wabash avenue, which continue over the bridge and in the center of it. At the time of the accident the street lights in Wacker drive and Wabash avenue had been extinguished. The testimony for plaintiffs was to the effect that there were no lights burning on the bridge, with the possible exception of one located in the abutment in the center of the south end of the bridge. On the north side of the river were "fairly tall buildings," all unlighted at the time. It was a dark night. Plaintiffs were in a Ford car, owned by Fitch and

not adequate evidence." The court further held that the evidence was not sufficient to establish the defendant's guilt beyond a reasonable doubt. The court also found that the defendant's defense was not adequately presented. The court's decision was based on the evidence presented at trial and the legal principles governing the case. The court's findings of fact and conclusions of law are set forth in the opinion. The court's decision is final and subject to appeal. The court's decision is based on the evidence presented at trial and the legal principles governing the case. The court's findings of fact and conclusions of law are set forth in the opinion. The court's decision is final and subject to appeal.

driven by him; plaintiff Dorothy Fitch sat to the right of him. Frost had driven south on Sheridan road to the Outer Drive, down the Outer Drive to Michigan avenue, and across the Michigan avenue bridge, where he turned west into Wacker drive. Defendant's car, a Studebaker, driven by one Kennedy, a servant of Central Chicago Garages, Incorporated, proceeded southward across the Wabash avenue bridge, where it entered Wacker drive. As the Ford car reached the southbound street car tracks on Wabash avenue the two cars collided. Both plaintiffs were seriously injured, but as defendant states that the damages awarded are not questioned, it is unnecessary to state the injuries sustained by each.

After a careful examination of the entire evidence we are unable to sustain the contention that plaintiffs were guilty of contributory negligence as a matter of law and that the court erred in not directing a verdict and in overruling defendant's motion for a judgment non obstante veredicto.

"A motion to instruct the jury to find for the defendant is in the nature of a demurrer to the evidence, and the rule is that the evidence so demurred to, in its aspect most favorable to the plaintiff, together with all reasonable inferences arising therefrom, must be taken most strongly in favor of the plaintiff. The evidence is not weighed, and all contradictory evidence or explanatory circumstances must be rejected. The question presented on such motion is whether there is any evidence fairly tending to prove the plaintiff's declaration. In reviewing the action of the court of which complaint is made we do not weigh the evidence; - we can look only at that which is favorable to appellant. Yess v. Yess, 256 Ill. 414; McCune v. Reynolds, 238 id. 138; Lloyd v. Rush, 273 id. 489." (Hunter v. Troup, 315 Ill. 293, 296-7.)

The same rule prevailed when the trial court was called upon to pass upon defendant's motion for a judgment non obstante veredicto. There is, undoubtedly, evidence that tends to support the contention of plaintiffs that their view to the north as they approached the intersection was obscured by a number of obstacles. Plaintiff Frost testified that as he approached Wabash avenue he slowed down his speed to five or ten miles an hour so that he could put the

car in second gear; that at the same time he looked to the south and then to the north; that he looked at the river and at the bridge; that he saw no automobiles approaching; that the first time he looked his car was about where the subway or lower level comes up to Wacker drive and Wabash avenue; that he was then 30 feet east of the east line of Wabash avenue; that he looked to the north again before he was hit; that as he approached Wabash avenue he was going ten to fifteen miles an hour, and as he crossed he was in second gear; that he did not see any automobile until he reached the south lane of Wabash avenue; that when he reached about the southbound street car tracks he saw an automobile coming from his right and almost on top of him; that he believed it was on the southbound street car tracks; that it was going very fast; that when he saw he was going to be hit he immediately turned his car to the left; that there was no change in the speed of the other car and no change in its course or direction until the time of the collision; that he (witness) turned his car south so that it was in a southwest position when the other car hit his right fender and wheel; that he does not know how many times his car rolled over; that as he approached the bridge he looked to the north, and after he was past the northbound section of Wabash avenue he looked in that direction again; that he also looked to the south to check on the northbound traffic; "that there wasn't anything coming from the south;" that until he passed "that girder or steel thing on the east side of the bridge" he could not see traffic approaching from his right.

Plaintiff Fitch testified that as they approached Wabash avenue there was but one lamp burning on the bridge; that it was located at the end of the bridge on the west side; that as they

approached the bridge she was looking to the right and saw no automobile approaching; that as they got within a few feet of the bridge they slowed their speed to about ten miles an hour and shifted into second; that she was looking to the north continually and that as they approached the east side of the bridge she saw nothing; that when they got to about the northbound car tracks she saw a car which seemed to come from at least halfway across the bridge; that it was going very fast indeed; that she thought it was going seventy miles an hour; that immediately after she saw the car Mr. Frost said, "Oh, my God," and immediately turned their car to the left; that their car was between the northbound and southbound car tracks at that moment; that the southbound car did not slacken its speed; that the driver of that car was looking straight ahead and did not change his position nor look in any other direction; that their car was headed southwest at the time of the impact; that there were no horns blown on defendant's car; that the right side of their car was struck by defendant's car; that defendant's car was going seventy miles an hour at the time of the collision, and their car was then going fifteen miles an hour; that from the time she first saw defendant's car until the contact not more than two seconds elapsed; that Mr. Frost had turned their car about ten feet to the left before the impact took place; that defendant's car was either black or dark blue in color; that she was positive that it had only parking lights at the time. The following is the settled rule of law in this state:

"The question of contributory negligence is usually a question for the jury. It only becomes one of law for this court when the undisputed evidence is so conclusive that it is clearly seen that the accident resulted from the negligence of the party injured and could have been avoided by the use of reasonable precaution. (Heidler v. Braushaw, 200 Ill. 425.) Where reasonable men acting within the limits prescribed by law might reach different conclusions, or different inferences could reasonably be drawn from the admitted or established facts, the

approached the bridge and was looking to the right and saw no
 automobile approaching; that at that time witness was not
 the bridge they drove upon and that he did not see any
 car strike him and a car which was in a line at the
 corner the bridge; that it was about 100 feet from the
 corner it was going away from him; that immediately before
 the car the driver said, "My God," and immediately turned
 their car to the left; that their car was between the automobile
 and the car at that moment; that the automobile was in
 the middle of the street; that the driver of the car was looking
 straight ahead and did not change his position and look in any
 other direction; that their car was looking straight ahead at the time of
 the impact; that there were no lights on the automobile's car; that
 the right side of their car was struck by the automobile's car; that
 defendant's car was going away from him at the time of the
 collision, and their car was then going toward him and they
 from the time the time the defendant's car and the witness's car
 were then the witness's car was struck by the automobile's car; that
 about ten feet to the left of the impact the witness's car
 defendant's car was struck by the automobile's car; that the
 the collision that it was only a few feet from the right side
 following in the street and he is now in the street.

"The question of whether or not the automobile is usually a
 question for the jury. It is only because of the fact that
 court that the witness's car was struck by the automobile's car
 is clearly seen that the witness's car was struck by the automobile's car
 of the jury's car and could have been avoided by the witness's car
 reasonable presumption. (Hoffman v. Granger, 100 Ill. 412.)
 these reasonable presumption that the witness's car was struck by the automobile's car
 of the jury's car and could have been avoided by the witness's car
 reasonably be shown from the evidence on which the jury is to decide."

question of contributory negligence is for the jury. (Illinois Central Railroad Co. v. Anderson, 184 Ill. 294; 1 Thornton on Negligence, 100.)" (Mueller v. Phelps, 252 Ill. 630, 634.)

"There is no rule of law which prescribes any particular act to be done or omitted by a person who finds himself in a place of danger. In the variety of circumstances which constantly arise it is impossible to announce such a rule. The only requirement of the law is that the conduct of the person involved shall be consistent with what a man of ordinary prudence would do under like circumstances." (Stack v. East St. Louis Ry. Co., 245 Ill. 308.)" (Pients v. Chicago City Ry. Co., 294 Ill. 246, 252.)

We certainly would not be warranted in holding that the jury acted unreasonably in the eye of the law in finding that plaintiffs were not guilty of contributory negligence. Indeed, after a careful consideration of the evidence sustaining plaintiffs' theory of fact we find ourselves in accord with the finding of the jury. Defendant makes the point that it was the duty of plaintiff Dorothy Fitch to warn the driver of the automobile in which she was riding as soon as danger was apparent to her and that she failed in that regard. There is no merit in this contention. Her evidence shows that Frost discovered the approaching automobile as soon as she did and that he took immediate steps to avoid the accident. Hence, there was no necessity of her warning Frost.

Defendant contends that "the verdict in the case of Benjamin D. Frost, plaintiff, was contrary to the manifest weight of the evidence and the trial court should have set it aside." A like contention is made as to the case of Dorothy Fitch, plaintiff. After a careful consideration of all the evidence we have reached the conclusion that these contentions are without merit. While the evidence shows that Kennedy, the driver of defendant's car, was present in the hallway adjacent to the court room during the time defendant's witnesses were testifying, defendant failed to call him as a witness. One of the issues of fact was, Did defendant's car run into plaintiff's car, or did plaintiff's car run into defendant's car? We are

question of causation is left to the jury. Illinois v. ...
Illinois v. ... (Ill. App. Ct. 1987, 111 Ill. App. 3d 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000)

"There is no rule of law which requires any particular
not to be done on a particular day. The law is a
place of honor. In the variety of circumstances which
arise it is impossible to lay down a rule. The only
recognition of the law is that the conduct of the person
shall be regulated with a view to giving justice to all
under the circumstances." (Ill. App. Ct. 1987, 111 Ill. App. 3d 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000)

It certainly would not be surprising in holding that the jury could
unreasonably in the eye of the law in finding that it was not
not guilty of conspiracy to defraud. Indeed, after a careful
consideration of the evidence sustaining plaintiff's theory of lost
we find ourselves in accord with the finding of the jury. We must
state the point that it was the jury of plaintiff's theory of lost
with the driver of the automobile in which she was riding to some
as against her opponent is not that she failed in that regard.
There is no merit in this contention. But evidence shows that
Treat discovered the apprehension necessary to know as to the law
that he took immediate steps to avoid the accident. Hence, there
was no necessity of her getting away.

Therefore, we hold that the verdict in the case of defendant
D. Treat, plaintiff, was contrary to the weight of the evi-
dence and the trial court should have set it aside. It is
also in accord with the rule of setting aside verdicts. It is
essential consideration of all the evidence of both parties and
also that these considerations are without merit. This the jury
found shows that Treat, the driver of defendant's car, was present
in the highway adjacent to the right turn which the two defendant's
witnesses were testifying, defendant failed to call any witnesses.
One of the issues of this case was defendant's car was in the
left lane at the time of the accident. The evidence shows that

satisfied that the jury were justified in finding that defendant's car ran into plaintiff's car. Not only the testimony of the two plaintiffs supports that finding, but also the testimony of the manager of the garage to which plaintiff's car was removed immediately after the accident; and the testimony of the police officer, who arrived on the scene five or ten minutes after the accident, as to the condition of plaintiff's car after the accident, proves clearly that defendant's car ran into the right side of plaintiff's car. Plaintiffs claimed that defendant's car had no lights on it other than parking lights. Defendant claimed that the Studebaker car had on bright head lights. During the examination of defendant's witness Wright the following occurred: "Q. By the way, did the southbound car have the parking lights on or bright lights, the Studebaker? A. Parking lights." Plaintiffs' testimony tended to show that defendant's car was being driven at a high rate of speed at the time of the accident. Defendant's testimony tended to show that the car was going at a speed of "about 25 to 30 miles per hour." But there are certain facts and circumstances that strongly support plaintiffs' theory of fact in that regard. The manager of the garage to which plaintiff's car was taken immediately after the accident testified that plaintiff's car was about the worst looking one that was ever brought into the garage. He described in detail the damage done to the car and stated that plaintiff Froot sold the wreck of the car to the garage for \$25. The evidence for defendant showed that plaintiff's car rolled over completely at least once and landed on its wheels again; that after the collision it was about four feet east of the safety island in Becker drive and facing east, "about 10 or 15 feet west of the car track;" that defendant's car, after the contact, "careened southeast and hit a

post, an island marker,* in Backer drive; then the two left hand wheels passed completely over the safety island in the street and the car passed to the west of the post and stopped in the space west of the safety island.

The only other contention raised by defendant is that counsel for plaintiffs was guilty of improper conduct in his cross-examination of the witness Bright. This contention is without the slightest merit.

The instant appeal does not present errors usually assigned in cases of this kind and it is evident that the case was fairly and ably tried.

The judgment of the Superior court of Cook county is affirmed.

JUDGMENT AFFIRMED.

Sullivan, P. J., and Friend, J., concur.

There is a large number of people who are not yet
 fully organized in the party and
 the one reason for this is the fact that the party
 is not yet fully organized.

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38722

DOROTHY FITCH,
Appellee,

v.

IVAN BIGGAR, as Receiver of
CENTRAL CHICAGO GARAGES,
INCORPORATED,
Appellant.

APPEAL FROM SUPERIOR
COURT OF COOK COUNTY.

287 I.A. 633¹

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

This case, Dorothy Fitch v. Ivan Biggar, as Receiver of Central Chicago Garages, Incorporated, App. Ct. Gen. No. 38722, was consolidated for hearing in the trial court with the case of Benjamin B. Frost v. Ivan Biggar, as Receiver of Central Chicago Garages, Incorporated, App. Ct. Gen. No. 38721, and the two cases were consolidated for hearing in this court. We have this day filed an opinion in case No. 38721, in which we have passed upon alleged errors assigned as to each case, and for the reasons stated therein the judgment of the Superior court of Cook county in the instant case is affirmed.

JUDGMENT AFFIRMED.

Sullivan, P. J., and Friend, J., concur.

28782

EDWARD W. VICTOR,
Appellant.

v.

IVAN RICHARD, as Receiver of
DISTRICT CHIEF OF POLICE,
INDICATED,
Appellee.

COURT OF COMMON PLEAS,
CITY OF PHILADELPHIA.

287 I.A. 638

MR. JUSTICE COCHRAN delivered the opinion of the court.

This case, Edward Victor v. Ivan Richard, is assigned to the
Court of Common Pleas, Philadelphia, for the year 1934.
was consolidated for hearing in the trial court with the case of
Johanna B. Smith v. Ivan Richard, as Receiver of District Chief of Police,
appellee, indicated, App. No. 20, 1934, and the two cases
were consolidated for hearing in this court. We have this day
filed an opinion in case No. 20, 1934, in which we have passed upon
alleged errors assigned as to each case, and for the reasons
stated therein the judgment of the superior court of each case
in the instant case is affirmed.

JUDGMENT AFFIRMED.

WILLIAM P. T. and Friends, P. 1. 1934.

38775

RITA MARY McMANUS, by FRANK H.
McMANUS, her father and next
friend,

Appellee,

v.

SUPREME BEVERAGE COMPANY,
a corporation,

Appellant.

99
APPEAL FROM SUPERIOR
COURT OF COOK COUNTY.

287 I.A. 633²

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

An action on the case brought by plaintiff, a minor, by her father and next friend, against defendant for personal injuries received. A jury returned a verdict finding defendant guilty and assessing plaintiff's damages at the sum of \$3,000. Defendant appeals from a judgment entered upon the verdict.

The case went to the jury on the first count of the complaint, which charges, in substance, that on April 16, 1934, defendant, through its servant, was operating a motor truck eastward on 81st street between Throop and Elizabeth streets, in Chicago; that plaintiff was then five years of age; that at said time and place defendant carelessly, negligently, wrongfully and improperly operated its automobile truck so that it ran upon and against plaintiff; that the truck was being driven through a closely built-up residence portion of Chicago at a rate of speed in excess of twenty miles an hour, in violation of the statute of the state; that defendant's driver carelessly, negligently and wrongfully operated the motor truck without keeping a reasonably careful lookout ahead in the direction in which the truck was moving, thereby causing it to run upon and against

RITA MARY MOMANUS, by FRANK H. MOMANUS, her father and next friend,
 Appellee,
 v.
 COLUMBIAN BEVERAGE COMPANY, a corporation,
 Appellant.

APPEAL FROM SUPERIOR COURT OF COOK COUNTY.

387 I.A. 633

MR. JUSTICE SEANAN DELIVERED THE OPINION OF THE COURT.

An action on the case brought by Plaintiff, a minor, by her father and next friend, against defendant for personal injuries received. A jury returned a verdict finding defendant guilty and assessing plaintiff's damages at the sum of \$3,000. Defendant appeals from a judgment entered upon the verdict. The case went to the jury on the first count of the complaint, which charges, in substance, that on April 16, 1934, defendant, through its servant, was operating a motor truck eastward on 81st street between Throop and Ellis both streets, in Chicago; that Plaintiff was then five years of age; that at said time and place defendant negligently, recklessly and improperly operated its automobile truck so that it ran upon and against Plaintiff; that the truck was being driven through a closely built-up residence portion of Chicago at a rate of speed in excess of twenty miles an hour, in violation of the statute of the state; that defendant's driver carelessly, negligently and recklessly operated the motor truck without keeping a reasonably careful lookout ahead in the direction in which the truck was moving, thereby causing it to run upon and against

plaintiff; that he carelessly and negligently operated the truck without giving any reasonable warning of its approach and without having used every reasonable precaution to avoid injuring plaintiff. Defendant filed an answer denying the allegations of the complaint and averring that plaintiff's injury was caused solely through her fault and negligence.

Defendant contends that plaintiff failed to prove defendant was guilty of negligence. There is not the slightest merit in this contention. Defendant offered no evidence, although it appears that the driver of the motor truck sat at the side of counsel for defendant at the trial of the cause as "a representative" of defendant. The evidence for plaintiff as to the manner in which the accident happened proves the following: Rita Mary McManus was five years of age at the time of the accident and was attending a kindergarten school. Her parents lived at 8232 Throop street, located around the corner from the place of the accident. There is a north and south alley midway between Elizabeth and Throop streets. An apartment building is located on the north side of 81st street, just west of the alley. Along 81st street there is a sidewalk six feet nine inches wide and a parkway twelve feet two inches wide. 81st street is twenty-eight feet in width from curb to curb. The accident occurred in the afternoon of a clear day and the streets were dry. The child came out of the alley on the north side of 81st street and proceeded at a slow trot southward across the sidewalk and parkway, across the north half of 81st street, and when she reached a point about three feet south of the center line of the street she was struck by the left front bumper or fender of defendant's truck, which was being driven east on 81st street at a speed of twenty-five or thirty miles an hour, on the south half of the street. She was thrown from three to seven or eight feet east and a little to the

plaintiff; that he carelessly and negligently operated the truck without giving any reasonable warning of its approach and without having used every reasonable precaution to avoid injuring plaintiff. Defendant filed an answer denying the allegations of the complaint and averring that plaintiff's injury was caused solely through her fault and negligence.

Defendant contends that plaintiff failed to prove defendant was guilty of negligence. There is not the slightest merit in this contention. Defendant offered no evidence, although it appears that the driver of the motor truck sat at the side of counsel for defendant at the trial of the cause as "a representative" of defendant.

The evidence for plaintiff as to the manner in which the accident happened proves the following: Rita Mary McKenna was five years of age at the time of the accident and was attending a kindergarten school. Her parents lived at 3232 Throop street, located around the corner from the place of the accident. There is a north and south alley midway between Ellis street and Throop streets. An apartment building is located on the north side of Ellis street, just west of the alley. Along Ellis street there is a sidewalk six feet nine inches wide and a pathway twelve feet two inches wide. Ellis street is twenty-eight feet in width from curb to curb. The accident occurred in the afternoon of a clear day and the streets were dry.

The child came out of the alley on the north side of Ellis street and proceeded at a slow trot southward across the sidewalk and parkway, across the north half of Ellis street, and when she reached a point about three feet south of the center line of the street she was struck by the left front bumper or fender of defendant's truck, which was being driven east on Ellis street at a speed of twenty-five or thirty miles an hour, on the south half of the street. She was thrown from three to seven or eight feet east and a little to the

north. After the truck struck plaintiff it swerved to the right, ran up on the parkway on the south side of the street, ran along the parkway for about forty feet, then ran off the parkway to the street, and finally came to a stop sixty to eighty feet east of the point of the accident. No horn was sounded by the driver of the motor truck prior to the accident. A woman who was on the north side of the street very close to the place of the accident heard the truck coming and screamed as the child trotted out into the street. From the time the child emerged from the alley at the building line until she was struck she was in plain view of the driver of the motor truck. The evidence also shows that from the time she emerged from the alley she was slowly trotting in a direction that would bring her into the path of the on-coming truck. Under the undisputed facts the jury were fully justified in finding that the driver of the truck was negligent.

Defendant contends that the amount of the damages is excessive. We find no merit in this contention. The attending physician testified that he first saw the child, after the accident, at the Englewood hospital; that she was semi-conscious for several days, due to "some brain concussion;" that an X-ray examination showed "a fracture in the skull - that is, the left side of the skull, through the temporal bone extending into the left parietal bone - and a fracture of the right clavicle;" that the fracture of the skull was approximately two and one-half inches in length and extended upwards and backwards. Five or six weeks after the accident the child was still unable to walk and "she had to learn to walk over again." She lost weight and was taken to Michigan for several weeks. She was unable to attend school until the fall term commenced. Since the accident "she is a restless sleeper and wakes up frightened." The hospital bill was \$39.85, the nurse's bill, \$32, and the doctor's bill, \$80. Defendant

After the truck struck plaintiff it swerved to the right, ran up on the parkway on the south side of the street, ran along the parkway for about forty feet, then ran off the parkway to the street, and finally came to a stop sixty to seventy feet east of the point of the accident. No horn was sounded by the driver of the motor truck prior to the accident. A woman who was on the north side of the street very close to the place of the accident heard the truck coming and screamed as the child trotted out into the street. From the time the child emerged from the alley to the building line until she was struck she was in plain view of the driver of the motor truck. The evidence also shows that from the time she emerged from the alley she was slowly trotting in a direction that would bring her into the path of the on-coming truck. Under the undisputed facts the jury were fully justified in finding that the driver of the truck was negligent.

Defendant contends that the amount of the damages is excessive. We find no merit in this contention. The attending physician testified that he first saw the child, after the accident, at the Englewood hospital; that she was semi-conscious for several days, due to "some brain commotion"; that an X-ray examination showed "a fracture in the skull - that is, the left side of the skull, through the temporal bone extending into the left parietal bone - and a fracture of the right clavicle"; that the fracture of the skull was approximately two and one-half inches in length and extended upwards and backwards. Five or six weeks after the accident the child was still unable to walk and "she had to learn to walk over again." The foot right and was taken to Michigan for several weeks. The was unable to attend school until the fall term commenced. Since the accident "she is a restless sleeper and wakes up frequently." The hospital bill was \$2,000.

offered no evidence as to plaintiff's injuries or condition.

During the examination of plaintiff's mother the following occurred: "Q. (by plaintiff's counsel) Is this plaintiff Rita Mary your only child? A. Yes, she is my only child. Mr. Crowe (defendant's counsel): If your Honor please - wait a minute. Mr. Sinnott (plaintiff's counsel): Q. In the month of April - Mr. Crowe: Now just a minute. If your Honor please, I want to suggest that I think that that question of counsel's is deliberately planned to prejudice this jury against my client. It serves no purpose. It is not an issue in this lawsuit whether this lady had one or fifty children. It can only serve one purpose and only probably is asked for one purpose, and I think your Honor ought to instruct the jury to disregard it. The Court: I believe the answer was not responsive to the question. He said: Is this your child? Mr. Crowe: Only child, he said. The Court: That wasn't the question, was it? Mr. Crowe: Read the question. Mr. Sinnott: Before we get into a discussion let me be heard. Mr. Crowe: Wait a minute. Read the question. (Question read.) Mr. Sinnott: And counsel made no objection to the question and the witness answered and after she answered then he interposes this prejudicial objection of his. The Court: Well, shouldn't your objection have been in time, Mr. Crowe? I would have sustained it. Mr. Crowe: Of course my mind works rather slowly. The Court: Well, I can only act as speedily as I am asked." Defendant's contention that the question was neither relevant nor material to a determination of the issues may be conceded. As the trial court stated, if counsel for defendant had made an objection in time it would have been sustained. Counsel for defendant conceded, in effect, that he was slow in making an objection. In any event, it is idle to argue that the answer of the witness influenced

offered no evidence as to plaintiff's injuries or condition.

During the examination of plaintiff's mother the following occurred: "Q. (by plaintiff's counsel) Is this plaintiff's sister Mary your only child? A. Yes, she is my only child. Mr. Growe (defendant's counsel): If your Honor please - wait a minute.

Mr. Ginnott (plaintiff's counsel): Q. In the month of April - Mr. Growe: Now just a minute. If your Honor please, I want to suggest that I think that that question of counsel's is a little exactly planned to prejudice this jury against my client. It serves no purpose. It is not an issue in this lawsuit whether this lady had one or fifty children. It can only serve one purpose and only probably is asked for one purpose, and I think your Honor ought to instruct the jury to disregard it. The Court: I believe the answer was not responsive to the question. He said: Is this your child? Mr. Growe: Only child, he said. The Court: That wasn't the question, was it? Mr. Growe: Read the question.

Mr. Ginnott: Before we get into a discussion let me be heard. Mr. Growe: wait a minute. Read the question. (Question read.) Mr. Ginnott: and counsel made no objection to the question and the witness answered and after she answered then he interposes this prejudicial objection of his. The Court: Well, wouldn't your objection have been in time, Mr. Growe? I would have sustained it. Mr. Growe: Of course my mind works rather slowly. The Court: Well, I can only act as quickly as I am asked."

Defendant's contention that the question was neither relevant nor material to a determination of the issues may be conceded. As the trial court stated, if counsel for defendant had made an objection in time it would have been sustained. Counsel for defendant conceded, in effect, that he was slow in making an objection. In any event, it is able to argue that the answer of the witness influenced

the verdict of the jury. Under the evidence an intelligent, honest jury could not have found a verdict for defendant, and the amount of damages awarded is not excessive.

It appears that counsel for defendant in his opening statement to the jury stated that plaintiff's physician had told him that there was a complete recovery by plaintiff. Counsel for plaintiff asked the physician if he had made such a statement to counsel for defendant, to which the witness answered, "Apparently from what you can see she looks all right, but we don't know what may develop in the future. Mr. Crowe: I move that that be stricken out. The Court: Yes, that is not responsive. Mr. Sinnett: Q. Is that what you told Mr. Crowe? A. Yes, I spoke of a possibility of epilepsy. Mr. Crowe: I move to strike it out. The Court: No." Then followed a colloquy between counsel and the court in which counsel for defendant insisted that the court and counsel for plaintiff had misunderstood what he had stated to the jury. The trial court thought, apparently, that because of what defendant's counsel had stated to the jury the physician had a right to state what he told the counsel, and allowed the answer to stand. Counsel for defendant has seen fit to omit from the report of proceedings his opening statement to the jury. Defendant contends that the court committed reversible error in allowing the physician's statement as to "a possibility of epilepsy" to stand. If it be assumed that the trial court's ruling was erroneous, we are satisfied that the answer of the physician did not influence the jury when they fixed the amount of the damages. As we have heretofore stated, the amount of the verdict is reasonable in view of the undisputed injuries sustained by plaintiff. It is the settled rule of law in this state that where it can be said from the record that the errors assigned could not reasonably have affected the

the verdict of the jury. Under the evidence an intelligent, honest jury could not have found a verdict for defendant, and the amount of damages awarded is not excessive.

It appears that counsel for defendant in his opening

statement to the jury stated that plaintiff's physician had told

him that there was a complete recovery by plaintiff. Counsel

for plaintiff asked the physician if he had made such a statement

to counsel for defendant, to which the witness answered, "apparently

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be stricken out. The Court: Yes, that is not responsive.

Mr. Sinnott: Q. Is that what you told Mr. Growe? A. Yes, I

spoke of a possibility of epilepsy. Mr. Growe: I move to strike

it out. The Court: No." Then followed a colloquy between counsel

and the court in which counsel for defendant insisted that the court

and counsel for plaintiff had misunderstood what he had stated to

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what defendant's counsel had stated to the jury the physician had

a right to state what he told the counsel, and allowed the answer

to stand. Counsel for defendant has seen fit to omit from the

report of proceedings his opening statement to the jury. Defendant

contends that the court committed reversible error in allowing

the physician's statement as to "a possibility of epilepsy" to

stand. If it be assumed that the trial court's ruling was erroneous,

we are satisfied that the answer of the physician did not influence

the jury when they fixed the amount of the damages. As we have

heretofore stated, the amount of the verdict is reasonable in view

of the undisputed injuries sustained by plaintiff. It is the settled

rule of law in this state that where it can be said from the record

that the errors asserted could not reasonably have affected the

result of the trial, the judgment of the trial court should be affirmed. That principle of law applies to the instant appeal.

The judgment of the Superior court of Cook county is affirmed.

JUDGMENT AFFIRMED.

Sullivan, P. J., and Friend, J., concur.

affirmed. That principle of law applies to the instant case. As a result of the trial, the judgment of the trial court should be

The judgment of the superior court of Cook county is

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Alfred P. L. and Thelma J. Jones

38806

In the Estate of PETER REPOLE,
Deceased, MARY REPOLE, Executrix,
Appellant,

v.

EDWARD L. S. ARKEMA,
Appellee.

Consolidated with

MARY REPOLE, Individually and as
Executrix of the Estate of PETER
REPOLE, Deceased,
Appellant,

v.

EDWARD L. S. ARKEMA et al.,
Appellees.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

287 I.A. 633³

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Mary Repole, as executrix of the estate of Peter Repole, deceased, appealed to the Circuit court of Cook county from an order of the Probate court removing her as executrix, requiring her to surrender certain personal property, and to pay the sum of \$2,187 to the administrator de bonis non with the will annexed. While the appeal was pending in the Circuit court, she, individually and as executrix, filed her complaint in that court asking a construction of the last will and testament of Peter Repole, deceased. By stipulation the appeal and the complaint were consolidated for hearing, "it appearing to the Court from representations made by the respective counsel, that the evidence to be introduced and the witnesses to be produced are substantially the same in each cause." The two causes were heard by the court, without a jury, evidence was introduced by both parties, and at the conclusion of the hearing

In the Estate of PETER REPOLE,
Deceased, MARY REPOLE, executrix,
Appellant,

v.

EDWARD L. S. ARKINA,
Appellee.

Consolidated with

MARY REPOLE, Individually and as
Executrix of the Estate of PETER
REPOLE, Deceased,

Appellant,

v.

EDWARD L. S. ARKINA et al.,
Appellees.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

3887 I.A. 683

MR. JUSTICE SCAMMAN DELIVERED THE OPINION OF THE COURT.

Mary Repole, as executrix of the estate of Peter Repole,
deceased, appealed to the Circuit Court of Cook County from an
order of the Probate Court removing her as executrix, requiring
her to surrender certain personal property, and to pay the sum
of \$2,187 to the administrator de bonis non in the will annexed.
While the appeal was pending in the Circuit Court, she, individually
and as executrix, filed her complaint in that court asking a con-
struction of the last will and testament of Peter Repole, deceased.
By stipulation the appeal and the complaint were consolidated for
hearing. At appearing to the Court from representations made by
the respective counsel, that the evidence to be introduced and the
witnesses to be produced are substantially the same in each cause,
the two causes were heard by the court, without a jury, evidence
being introduced by both parties, and at the conclusion of the hearing

the court, upon motion of appellees, entered an order dismissing the appeal from the Probate court and also dismissing the complaint. Mary Repole, individually and as executrix, has appealed from the order.

The amended petition of Rosario Nicolais et al., upon which the order in the Probate court was based, reads as follows:

"Now come Sarah Repole, Angeline Repole, Mary Repole and Rose Repole, Sam Nicolais, Sarah Nicolais, Rosario Nicolais, Camilla Nicolais and Theresa Altimare and respectfully represent unto your Honor that they are remaindermen, legatees and devisees under the Last Will and Testament of Peter Repole, deceased.

"Your petitioners further represent that on the 14th day of March, 1935 [March 14, 1929], Letters Testamentary issued to Mary Repole (but not the Mary Repole herein named as one of the petitioners), and that said Letters were in full force and effect until the said Mary Repole was discharged as Executrix on May 15, 1934, by order of this Court.

"* * * That certain monies were collected by the Executrix of this estate upon a first mortgage on property at 525 West 28th Street, Chicago, Illinois, and that no accounting of said monies was made.

"* * * That the said Mary Repole, Executrix, did waste and mismanage the said estate and did not make a true and perfect Inventory in the said estate, nor did she render a fair and just account of her Executorship when required to do so by law, and your petitioners represent that she did not act in good faith in the administration of the said estate, and that she violated her oath of office in that she did not well and truly execute the Last Will and Testament of Peter Repole, deceased; that the said Executrix violated the obligation and condition in her bond, in that she did not make or cause to be made a true and perfect Inventory of all and singular the goods and chattels, rights and credits, lands, tenements and hereditaments and the rents and profits issuing out of the same, belonging to the said deceased, which came to her hands, possession and knowledge as required by law, and in that she did not make and render a fair and just account of her acts and doings as such Executrix when thereunto lawfully required, nor did she well and truly fulfill her duties enjoined on her in and by the Last Will and Testament of Peter Repole, deceased, nor did she do in general acts required of her by law from time to time.

"* * * That by virtue of said Executrix's failure to comply with her bond heretofore given in the above estate as aforesaid, the said Executrix has become liable on her said bond in certain sums, the exact sums being to your petitioners unknown.

"* * * That a hearing was had on a petition filed by your petitioners before Judge Joseph F. Geary, one of the Associate Judges of this Court, the matter came up on the regular

the court, upon motion of appellees, entered an order dismissing the appeal from the probate court and also dismissing the complaint. Mary Nepole, individually and as executrix, has appealed from the order.

The amended petition of Rosario Nicolais et al., upon which the order in the probate court was based, reads as follows:

"Now come Berni Nepole, Rosario Nicolais, Mary Nepole and Rose Nepole, Rosario Nicolais, Rosario Nicolais, Rosario Nicolais and Theres Altimare and respectfully represent unto your Honor that they are the surviving, lawful and devisees under the last will and testament of Peter Nepole, deceased. Your petitioners further represent that on the 14th day of March, 1935 [March 14, 1935], Letters Testamentary issued to Mary Nepole (not the Mary Nepole herein named as one of the petitioners), and that said letters were in full force and effect until the said Mary Nepole was discharged as executrix on May 15, 1934, by order of this Court.

"* * * That certain monies were collected by the executrix of this estate upon a first mortgage on property at 2825 West 38th Street, Chicago, Illinois, and that no accounting of said monies was made.

"* * * That the said Mary Nepole, executrix, did waste and mismanage the said estate and did not make a true and correct inventory in the said estate, nor did she render a fair and true account of her stewardship when requested to do so by law, and your petitioners represent that she did not act in good faith in the administration of the said estate, and that she violated her oath of office in that she did not will and truly execute the last will and testament of Peter Nepole, deceased; that the said executrix violated the obligation and condition in her bond, in that she did not make or cause to be made a true and correct inventory of all and singular the goods and chattels, rights and credits, lands, tenements and hereditaments and the rents and profits pertaining to the said deceased, which came to her hands, possession and control as required by law, and in that she did not make and render a fair and true account of her acts and doings as such executrix upon the same as lawfully required, nor did she will and truly fulfill her duties enjoined on her in and by the last will and testament of Peter Nepole, deceased, nor did she do in general that required of her by law from time to time.

"* * * That by virtue of said account, failure to comply with her bond and before given in the probate court, Rosario Nicolais, the said executrix has become liable on her said bond and in certain sums, the exact sums being to your petitioners unknown.

"* * * That a hearing was had on a petition filed by our petitioners before Judge Joseph L. Geary, one of the associate judges of this Court, the matter came up on the return

trial call and being referred to the aforesaid Judge of this Court, summons having been served on the Executrix, Mary Repole, and return having been duly made that upon said hearing the Court found that fraud existed in that assets of this estate which were collected were not inventoried.

"* * * That on March 28, 1934, a bill of foreclosure was filed in the Circuit Court No. 34 C.4067 by Julia C. Marx et al. vs. Mary Repole, Executrix upon property located at 3150 Princeton Ave., Chicago, Illinois.

"Your petitioners further represent that they have the interest of remaindermen in said property located at 3150 Princeton Ave; that due to the fraudulent inventory filed by the Executrix and her failure to properly apply the funds of this Estate the said property has become wasted and lost to your petitioners.

"Wherefore, your petitioners pray that an order be entered removing Mary Repole and revoking Letters Testamentary issued to her March 14, A. D. 1929, as Executrix of the Estate of Peter Repole, deceased; that said Executrix be ordered to surrender and account to this Court and to the Administrator De Bonis Non With Will Annexed that this Court shall see fit to appoint to succeed said Mary Repole for all assets collected by her and not inventoried or accounted for by her as Executrix; that this Court appoint one of the petitioners as Administrator De Bonis Non With Will Annexed upon his filing a bond with this Court and an approval of the same and for all other relief as this Court shall deem meet and proper in the premises."

The following is the answer of Mary Repole to the petition:

"Now comes Mary Repole heretofore summoned to answer the petition of Sarah Repole, et al. as reversionary heirs of said estate, and makes answer to said petition, and for answer thereto says:-

"That it is true that publication and service of notice upon the heirs herein for final closing of said estate on October 27th 1933 was duly made, and that thereupon and thereafter the final hearing upon same was continued from time to time until June 21st, 1934, at which time a hearing upon the final report and account of said Mary Repole as executrix of said estate was had, and said estate was then and there duly settled and closed. That said cause did come up for hearing on May 15th, 1934, at which time the hearing was continued until June 1st, 1934, when same was again continued to June 6th, 1934, and again continued until June 21st, 1934, at 2 P. M. at which time said estate was closed as aforesaid. All of which will more fully appear by the docket and records of this Court in said estate.

"Further answering this respondent Mary Repole denies that she failed to render an adequate report of the assets of said estate as charged in said petition, but on the contrary states that all of the cash assets of said estate were fully inventoried by her after the receipt thereof from the Administrators to Collect first appointed by the Court. All of which will more fully appear from the final report and account of the Administrators to collect and from the inventory and final report and account of

this respondent as executrix, all of which will more fully appear from the files and records of this Court in said estate.

"Further answering this respondent says that under the last will and testament of Peter Repole deceased, the petitioners took nothing except a reversionary interest in the real estate at 3150 Princeton Avenue after the death of this respondent who was given a life estate in the incomes and profits of said real estate, and that therefore this respondent was not bound to account to said estate for rents collected from said real estate.

"* * * That it will appear from said last will and testament of Peter Repole, deceased, that the petitioners herein were to take no personal property under said Will; that the proceeds of the mortgage covering property at 525 W. 28th street, and the bank deposits mentioned in said Will and in the petition herein filed were left to this respondent with directions that same be applied toward the first mortgage of \$4000.00 on the real estate at 3150 Princeton Avenue. That this respondent did collect the proceeds of the said mortgage on the property at 525 W. 28th street, amounting to \$1100.00 all of which was applied to the payment of interest on the \$4000.00 mortgage on the property at 3150 Princeton Avenue. That all of the cash bank deposits were collected in by the Administrators to Collect appointed by the Court prior to the appointment of this respondent as executrix under said Will, and were inventoried by them as part of the assets of said above estate, as will more fully appear by the inventory and final account of said Administrators to Collect, which inventory and final account were duly approved by this Court.

"Further answering this respondent shows that in the effort to carry out the directions and intentions of said testator as expressed by said Last Will and testament, and in order to preserve the real estate devised to respondent as life tenant and to petitioners as reversionary devisees, this respondent expended divers sums of money in excess of the \$1100.00 collected by her from the mortgage on the West 28th street property, out of her own means and income, as will appear by the following, to-wit:-

Collected from mortgage on property at 525 W. 28th Street.....	\$ 1,100.00
Paid to West Thirty-First Street State Bank for account of mortgage on 3150 Princeton Avenue 9 interest notes of \$135.00 each . . .	\$ 1,215.00
Paid for Extension of said mortgage October 1st, 1929	112.50
Paid for Extension of said mortgage January 16th, 1933	67.50
Paid for necessary repairs to real estate in order to secure above extensions	1,000.00
Paid for taxes on 3150 Princeton Avenue . . .	1928 \$ 103.37 1929 122.44 1930 90.69 1931 <u>61.38</u>
	378.88
	<u>\$ 3,773.88</u>

This respondent an executor, all of which will more fully appear from the list and records of this estate in said estate.

"Further answering this respondent says that under the last will and testament of Peter Popole deceased, the petitioner took nothing except a reversionary interest in the real estate at 3150 Princeton Avenue after the death of this respondent who was given a life estate in the income and profits of said real estate, and that therefore this respondent was not bound to account to said estate for a net collected from said real estate.

"* * * That it will appear from said last will and testament of Peter Popole, deceased, that the petitioner herein was to take no personal property under said will; that the proceeds of the mortgage covering property at 322 1/2, 33rd Street, and the bank deposits mentioned in said will and in the petition herein filed were left to this respondent with directions that some be applied toward the first mortgage of \$400.00 on the real estate at 3150 Princeton Avenue. That this respondent did collect the proceeds of the said mortgage on the property at 322 1/2, 33rd Street, amounting to \$100.00 all of which was applied to the payment of interest on the \$400.00 mortgage on the property at 3150 Princeton Avenue. That all of the bank deposits were collected in by the Administrator to collect appointed by the Court prior to the appointment of this respondent as executor under said will, and were inventoried by them as part of the said above estate, as will more fully appear by the inventory and final account of said Administrator to collect, which inventory and final account were duly approved by the Court.

"Further answering this respondent shows that in the effort to carry out the directions and intentions of said testator as expressed by said last will and testament, and in order to preserve the real estate devised to respondent of this tenant and to petitioner as reversionary interest, this respondent expended various sums of money in cases of the \$100.00 collected by her from the mortgage on the said 322 1/2, 33rd Street, out of her own means and income, as will appear by the following, to-wit:-

Collected from mortgage on property at	
322 1/2, 33rd Street.....	\$ 1,100.00
Paid to West Thirty-Third Street State Bank	
for account of mortgage on 3150 Princeton	
Avenue 9 interest notes of \$35.00 each	1,100.00
Paid for Extension of said mortgage	
October 1st, 1927.....	110.00
Paid for Extension of said mortgage	
January 1st, 1928.....	67.00
Paid for necessary repairs to real estate	
in order to secure above extensions	1,000.00
Paid for taxes on 3150	
Princeton Avenue * ..	1928
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RECAPITULATION.

Amount expended by respondent
for property at 3150 Princeton
Avenue \$ 3,773.88

Proceeds of mortgage collected
525 W. 28th street 1,100.00
Amount expended in excess of collection \$ 2,673.88

"Further answering this respondent states that the cash assets inventoried in said estate were not sufficient to pay all costs and claims in full as will appear by the final account and report of this respondent as executrix, and this respondent paid out of her own means sufficient moneys to pay all costs, claims and charges in full.

"* * * That the petition of Sarah Repole, et al. herein filed, was not filed in good faith for reasonable cause, but solely for the purpose of vexing, annoying and harassing this respondent and to cause her additional expense for costs and attorneys fees. That shortly after the appointment of respondent as executrix of said estate of Peter Repole, these same petitioners, or some of them, filed a wholly vexatious and unwarranted suit in the Circuit Court of Cook County to contest the said last will and testament of Peter Repole on the grounds of fraud and undue influence on the part of this respondent; which said suit came on for hearing and thereupon said Circuit Court of Cook County entered an order directing the jury to find the issues for this respondent and dismissed said proceeding for want of equity.

"* * * That the final report and account of the Administrators to Collect was filed and approved by this Court prior to the appointment of this respondent as executrix under said Will, and therefore this respondent can not be charged with any waste or mismanagement of said estate in respect thereto.

"* * * That it will appear from the final account and report of this respondent as executrix that the sum of \$150.00 allowed to the attorneys for said executrix included services rendered in defending the Will contest in said Circuit Court case, No. B-197473, which services were rendered to said estate and properly included in said final account and report.

"Further answering this respondent denies that she has in any manner whatsoever wasted or mismanaged said estate, and denies that she has failed to make a just and true account therein.

"Wherefore this respondent states that the prayer of said petition should be denied, which is accordingly prayed."

The following is the order entered by the Probate court upon the petition and from which Mary Repole appealed to the Circuit court:

"This matter coming on to be heard upon the petition of certain remaindermen, devisees and legatees of the deceased Peter Repole, to-wit: Sam Nicolais, Sarah Nicolais, Rosario

RECAPITULATION.

Amount expended by respondent
for property at 110 Avenue
..... \$ 5,775.25

Proceeds of mortgagable collected
\$25.00
Amount expended in wages of collection
..... 1,100.00
..... 2,000.00

"Further answering this respondent states that the cash
assets inventoried in said estate were not sufficient to pay all
costs and claims in full as will appear by the final account and
report of this respondent as executor, and this respondent
paid out of her own means sufficient moneys to pay all costs,
claims and charges in full.

"* * * That the petition of John Regol, et al., herein
filed, was not filed in good faith for reasonable cause, but
solely for the purpose of vexing, harassing and harassing this
respondent and to cause her additional expense for costs and
attorneys fees. It is hereby after the respondent or respondent
as executor of said estate of Peter Regol, deceased, and
was, or some of them, filed a wholly vexatious and unnecessary
suit in the Circuit Court of Cook County to contest the said
will and testament of Peter Regol of the County of Cook and
under influence on the part of this respondent; which said suit
came on for hearing and thereupon said Circuit Court of Cook
County entered an order directing the jury to find the same
for this respondent and dismissed said proceeding for want of
equity.

"* * * That the final report and account of the said
executor to collect was filed and approved by this Court prior
to the appointment of this respondent as executor and said
will, and therefore this respondent can not be charged with any
waste or mismanagement of said estate in respect thereto.

"* * * That it will appear from the final account and
report of this respondent as executor that the sum of \$10,000
allowed to the attorneys for said executor included services
rendered in obtaining the will contest in said Circuit Court
case, do. B-107473, which services were rendered to said estate
and properly included in said final account and report.

"Further answering this respondent denies that she has
in any manner whatsoever mismanaged said estate, and
denies that she has failed to make a just and true account
therein.

"Wherefore this respondent at the last the prayer of
said petition should be denied, which is solemnly prayed.
The following is the order entered by the Probate Court upon
the petition and from which copy is appended to the Circuit
Court:

"This matter coming on to be heard upon the petition
of certain remaindermen, devisees and legatees of the deceased
Peter Regol, to-wit: Mrs. Josephine, Mrs. John A. Regol, Sonnette

Nicolais and Camilla Nicolais and the answer of Mary Repole, Executrix of the Estate of Peter Repole, said answer putting in issue the validity of the order heretofore entered by this Court on January 14, A. D. 1935 wherein a finding was made that fraud existed in the inventory in that assets of this estate were not inventoried and by reason of said finding the order of June 21, A. D. 1934 approving the final account of Mary Repole, Executrix, was set aside and leave was given to the petitioners to file their objections to the inventory and final account of said Executrix; the Court after hearing the evidence and arguments of counsel finds: that the petition heretofore filed by Rosario Nicolais et al. was sufficient in form and substance as objections to the inventory and final account of Mary Repole, Executrix; that the Court has jurisdiction over the subject matter and parties hereto; that the order entered on January 21, A. D. 1935 as heretofore described was properly entered by this Court; that \$2187.00 was collected by the Executrix upon a first mortgage of property located at 525 West 28th Street, Chicago, Illinois; that said Executrix, Mary Repole, further collected as assets of the Estate of Peter Repole, deceased, one player piano and one diamond ring, said diamond being 1/4 inch in diameter; one 1927 Flying Cloud Reo Sedan; one gold watch with white stone locket, household furnishings of Peter Repole, deceased, except one parlor suite, one rug, and one bedroom suite, located at 3150 S. Princeton Avenue, Chicago, Illinois; all of which foregoing personal property was collected by the Executrix Mary Repole and not inventoried or accounted for in the aforesaid final report and account; that this Court finds, therefore that fraud existed in the inventory and final report and account of Mary Repole, Executrix, that the foregoing assets of the Estate of Peter Repole, deceased, were not inventoried and accounted for in distribution and application by her according to the terms of the Will, therefore:

"It is hereby ordered, adjudged and decreed that the Letters Testamentary issued to Mary Repole, March 14, A. D. 1929 be revoked but that she be not released on her bond, and that Edward L. S. Arkema be appointed Administrator de Bonis Non with the Will Annexed upon a filing a bond with this Court and the approval by this Court of said bond in the sum of \$4000.00.

"It is further ordered, adjudged and decreed that Mary Repole, Executrix, file with this Court within thirty days from date hereof a true and just amended inventory and final account of all assets of this estate collected by her and in particular to wit: sums paid upon a first mortgage on property situated at 525 West 28th Street, Chicago, Illinois, in the amount of \$2187.00; one 1927 Flying Cloud Reo Sedan; one player piano; one ring with a diamond about 1/4 inch in diameter; one watch with studded locket; household furnishings, except as to one parlor suite, one rug and one bedroom suite, located at 3150 S. Princeton Avenue, Chicago, Illinois.

"It is further ordered, adjudged and decreed that the aforesaid personal property and all other assets of this estate not heretofore inventoried by Mary Repole be surrendered to the Administrator de Bonis Non With the Will Annexed herein appointed within thirty days from the approval of her, Mary Repole's, amended inventory and amended final account.

"It is further ordered, adjudged and decreed that leave be given Mary Repole, Executrix, to appeal to the Circuit Court from the orders and decrees herein entered, upon the filing and approval by this Court of a bond in the sum of \$250.00 within twenty days from date hereof."

Appellant contends that the dismissal of her appeal from the Probate court by the Circuit court was not a proper judgment to enter in the cause; that it was the duty of the Circuit court, upon her appeal, to try the cause de novo, to make findings upon the issues presented by the petition and her answer to the same, and to enter a judgment based upon the findings. It is obvious that the contention of appellant is a meritorious one, as we are satisfied from an inspection of the record that there is no merit in appellees' position that the order of dismissal can be sustained, upon the ground of want of jurisdiction, "as plaintiff did not file a proper appeal bond." Appellees concede that the appeal bond was filed by appellant in the Probate court after it had been approved by the judge of that court, but they contend that it was not filed within the twenty days fixed in the order from which appellant appealed. That order was entered on February 14, 1935, and the appeal bond was filed and approved on March 6, 1935, which was within the time fixed by the order. But even if the bond had not been filed in time, the appellees are in no position to raise the question of want of jurisdiction. After the appeal had been docketed in the Circuit court the appellees filed a general appearance in the cause. They stipulated that the appeal and the complaint should be consolidated for hearing before the trial court. They claim that prior to the hearing they raised the point of want of jurisdiction by a written motion to dismiss. That motion falls far short of the requirements of a pleading intended to raise a question of want of jurisdiction. It was denied, and it is clear that appellees acquiesced in that ruling. They took

"It is further ordered, signed and decreed that leave be given Mary Hagle, formerly, as stated in the Court's order from the order and other heretofore, from the Court and approved by this Court on a bond in the sum of \$100.00 within twenty days from date hereof."

Appellant contends that the granting of her appeal from the Probate Court by the Circuit Court was not a proper judgment to enter in the cause; that it was the duty of the Circuit Court, upon her appeal, to try the cause de novo, to make findings upon the issues presented by the petition and her answer to the same, and to enter a judgment based upon the findings. It is wherein

that the contention of appellant is a jurisdictional one, as we are satisfied from an inspection of the record that there is no merit in appellant's position that the order of judgment can be sustained, upon the ground of want of jurisdiction. The plaintiff did not file a proper appeal bond. Appellate records show that the appeal bond was filed by appellant in the Probate Court after it

had been approved by the judge of that court, but that content that it was not filed within the twenty day limit in the order from which appellant appealed. That content was entered on February

4, 1935, and the appeal bond was filed and approved on March 6, 1935, which was within the time limit by the order. But even if the bond had not been filed in time, the appellant was in no position to

also the question of want of jurisdiction. After the appeal had been docketed in the Circuit Court the appellant filed a general appearance in the cause. They stipulated that the appeal and the

complaint should be consolidated for hearing before the trial court. They claim that prior to the hearing they raised the point of want of jurisdiction by a written motion to dismiss. That

motion falls far short of the requirements of a proper introduction to raise a question of want of jurisdiction. It was denied, and it is clear that appellant acquiesced in that ruling. They seek

an active part in the trial of the cause, introduced evidence in their behalf, and cross-examined the witnesses introduced by appellant. They stipulated with appellant as to certain facts. At the outset of the hearing appellees filed a written motion to dismiss not the appeal case, but the complaint. Under the record they waived any question of jurisdiction. (See Davison v. Heinrich, 340 Ill. 349, 352-3.)

Appellees contend that the order of dismissal can be affirmed upon the theory that the trial court intended by the order to affirm the judgment of the Probate court. There is no merit in this contention. Upon appeal from the Probate court the Circuit court does not sit as a court of error and it has no power to enter an order affirming or reversing the order of the Probate court: its duty is to try the cause de novo.

Appellant contends that the court erred in dismissing her complaint. We have carefully considered this contention and have reached the conclusion that it is not a meritorious one. We find nothing in the short, plain will of Peter Repole that requires a construction by the court. Equity will not entertain a complaint for the construction of a will when the instrument is not ambiguous.

That part of the order of the Circuit court of Cook county dismissing the appeal from the Probate court of Cook county is reversed, and the cause, as to that appeal, is remanded to the Circuit court for a new trial. That part of the order dismissing appellant's complaint is affirmed.

THAT PART OF ORDER OF CIRCUIT COURT DISMISSING
APPEAL FROM PROBATE COURT REVERSED, AND CAUSE,
AS TO THAT APPEAL, REMANDED TO CIRCUIT COURT
FOR NEW TRIAL; THAT PART OF ORDER DISMISSING
COMPLAINT AFFIRMED.

Sullivan, P. J., and Friend, J., concur.

an active part in the trial of the cause, introduced evidence in their behalf, and cross-examined the witnesses introduced by appellant. They stipulated with appellant as to certain facts. At the outset of the hearing appellant filed a written motion to dismiss not the appeal case, but the complaint. Under the record they waived any question of jurisdiction. (See Davidson v. Davidson, 340 Ill. 349, 352-3.)

Appellees contend that the order of dismissal can be affirmed upon the theory that the trial court intended by the order to affirm the judgment of the Probate court. There is no merit in this contention. Upon appeal from the Probate court the Circuit court does not sit as a court of error and it has no power to enter an order affirming or reversing the order of the Probate court: its duty is to try the cause de novo.

Appellant contends that the court erred in dismissing her complaint. We have carefully examined this complaint and have reached the conclusion that it is not a malicious one, we find nothing in the facts, plain and of proper belief that warranted a continuation by the court. Merely will not sustain a complaint for the continuation of a will when the instrument is not ambiguous. That part of the order of the Circuit court of Cook county dismissing the appeal from the Probate court of Cook county is reversed, and the cause, as to that appeal, is remanded to the Circuit court for a new trial. That part of the order dismissing appellant's complaint is affirmed.

THAT PART OF ORDER OF CIRCUIT COURT DISMISSING APPEAL FROM PROBATE COURT REVERSED, AND CAUSE, AS TO THAT APPEAL, REMANDED TO CIRCUIT COURT FOR A NEW TRIAL; BUT THAT IN OTHER RESPECTS COMPLAINT AFFIRMED.

38854

H. E. LACY MFG. CO., a
corporation,
Appellant,

v.

LACY PRODUCTS CORP.,
a corporation,
Appellee.

APPEAL FROM CIRCUIT COURT,

COOK COUNTY.

287 I.A. 633⁴

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Plaintiff appeals from an order entered December 12, 1935, assessing damages against it for attorneys' fees alleged to have been incurred by defendant in procuring the dissolution of a temporary injunction.

On August 30, 1935, plaintiff filed a complaint praying that defendant be enjoined from interfering with the business of plaintiff and from threatening plaintiff's customers and prospective customers with suits by reason of their use of plaintiff's products, and seeking damages for alleged unfair practices indulged in by defendant prior to the institution of the suit. On September 19, 1935, defendant filed a motion to dismiss the complaint for certain alleged insufficiencies as to the form of complaint. Thereupon the court ordered defendant to file its answer to the complaint in ten days. On October 11, 1935, defendant filed its answer denying the allegations of the complaint and further denying that plaintiff was entitled to the relief prayed for. On October 17, 1935, the court entered the following order:

"On motion of Charles A. Boyle solicitor for defendant, Lacy Products Corp., it appearing to the Court that temporary

LACY PRODUCTS CORP.,
 a corporation,
 Appellee,
 v.
 H. M. LACY MFG. CO., a
 corporation,
 Appellant.

COOK COUNTY,
 APPEAL FROM CIRCUIT COURT.

207 I.A. 638

MR. JUSTICE SCAMMEL DELIVERED THE OPINION OF THE COURT.

Plaintiff appeals from an order entered December 12, 1935, assessing damages against it for attorney's fees alleged to have been incurred by defendant in procuring the dissolution of a temporary injunction.

On August 30, 1935, plaintiff filed a complaint praying that defendant be enjoined from interfering with the business of plaintiff and from threatening plaintiff's customers and prospective customers with suits by reason of their use of plaintiff's product, and seeking damages for alleged unfair practices indulged in by defendant prior to the institution of the suit. On September 19, 1935, defendant filed a motion to dismiss the complaint for certain alleged immaterialities as to the form of complaint. Thereupon the court ordered defendant to file its answer to the complaint in ten days. On October 11, 1935, defendant filed its answer denying the allegations of the complaint and further denying that plaintiff was entitled to the relief prayed for. On October 17, 1935, the court entered the following order:

"On motion of Charles A. Boyle, solicitor for defendant, Lacy Products Corp., it appearing to the Court that temporary

injunction granted by this court on August 31, 1935 was secured ex parte and without notice to this defendant; and it further appearing that the answer has been filed herein, and it further appearing that the ends of equity will be best served by a hearing upon bill and answer,

"It Is Hereby Ordered that the temporary injunction herein be dissolved and that the hearing in this cause be continued to Nov. 4, 1935 at 2 o'clock until heard, all without notice to the parties -"

On November 6, 1935, plaintiff filed a motion to "dismiss the complaint herein," and thereupon, upon the same day, the court entered the following order:

"On motion of Maruce S. Cayne solicitor for plaintiff for leave to dismiss the complaint herein and the parties hereto appearing in Court by their respective attorneys upon notice duly given

"And it appearing to the Court that no counter-claim or cross-complaint has been filed heretofore

"And the Court being otherwise fully advised in the premises:

"It is hereby ordered that the above entitled cause be and the same is hereby dismissed without plaintiff's costs, costs having been paid.

"It is hereby further ordered that the bond heretofore filed in this cause stand until the determination by the Court of defendant's damages, if any."

On December 5, 1935, defendant filed a motion for leave to file "its suggestion of damages incurred in the dissolution of the injunction heretofore granted," and the court thereupon entered an order granting said motion. On the same date defendant filed its suggestion of damages, in which it averred that it had sustained damages in the sum of \$300 "for the reasonable fees and charges of his solicitors and counsel and for other charges and expenses in and about the procuring of the dissolution of the writ of injunction in said cause, rendered necessary therein by reason of the wrongful suing out of the same." On December 12 the trial court entered an order finding that defendant had sustained damages by reason of the suing out of the injunction and had become liable to Charles A. Boyle in the amount of \$200

injunction granted by this court on August 31, 1935 was secured
ex parte and without notice to said defendant; and it further
appearing that the answer has been filed herein, and it further
appearing that the ends of equity will be best served by a hearing
upon bill and answer,

"It is hereby ordered that the temporary injunction herein
be dissolved and that the hearing in this cause be continued to
Nov. 4, 1935 at 2 o'clock until heard, all without notice to the
parties -"

On November 6, 1935, Plaintiff filed a motion to "dismiss the
complaint herein," and thereupon, upon the same day, the court

entered the following order:

"On motion of Maurice S. Byrne solicitor for Plaintiff
to leave to dismiss the complaint herein and the parties hereto
appearing in Court by their respective attorneys upon notice
fully given

"And it appearing to the Court that no counter-claim
or cross-complaint has been filed heretofore

"And the Court being otherwise fully advised in the
premises:

"It is hereby ordered that the above entitled cause be
and the same is hereby dismissed without Plaintiff's costs,
costs having been paid.

"It is hereby further ordered that the bond heretofore
filed in this cause stand until the determination by the Court
of defendant's damages, if any."

On December 2, 1935, defendant filed a motion for leave to file

its suggestion of damages incurred in the dissolution of the
injunction heretofore granted," and the court thereupon entered

an order granting said motion. On the same date defendant filed

its suggestion of damages, in which it averred that it had un-
satisfied damages in the sum of \$500 "for the reasonable fees and

charges of his solicitors and counsel and for other charges and
expenses in and about the procuring of the dissolution of the

injunction in said cause, rendered necessary therein by
reason of the wrongful going out of the same." On December 12

the trial court entered an order finding that defendant had
sustained damages by reason of the going out of the injunction
and had become liable to Charles A. Boyle in the amount of \$500

for his services in procuring the dissolution of the injunction, and ordering plaintiff to pay to defendant or its attorney said sum. Plaintiff appeals from that order.

Plaintiff has raised and argued six points in support of its contention that the judgment order should be reversed, but it is only necessary to pass upon one of the points. Plaintiff contends that the trial court had no jurisdiction to assess damages upon a suggestion filed after the dismissal of the proceedings. This contention is a meritorious one. Sec. 12, ch. 69, Ill. State Bar Stats. 1935, reads as follows:

"In all cases where an injunction is dissolved by any court of chancery in this State, the court, after dissolving such injunction, and before finally disposing of the suit, upon the party claiming damages by reason of such injunction suggesting, in writing, the nature and amount thereof, shall hear evidence and assess such damages as the nature of the case may require, and to equity appertain, to the party damaged by such injunction, and may award execution to collect the same: Provided, a failure so to assess damages shall not operate as bar to an action upon the injunction bond."

Plaintiff dismissed its suit on November 6, 1935, leave was not granted defendant to file its suggestion of damages until December 5, and the order assessing damages was not entered until December 12, 1935. Suggestions of damages may be filed, upon leave, at any time before a decree is filed, and it has been held that where that is done a trial court, by reserving in the decree the question of the assessment of damages for a further hearing, retains jurisdiction for the purpose of hearing and determining the said question. But here leave was given to file the suggestion of damages nearly a month after the entry of the final order. The motion and the suggestion of damages therefore came too late. Had the trial court, on December 5, vacated the order of November 6, he might then have properly granted leave to defendant to file its suggestion of damages, and he might also, upon a hearing held before or after the re-entry of the decree dismissing the suit, have entered an

for his services in procuring the dissolution of the injunction, and ordering plaintiff to pay to defendant or its attorney said sum. Plaintiff appeals from that order.

Plaintiff has raised and argued six points in support of the contention that the judgment order should be reversed, but it is only necessary to pass upon one of the points. Plaintiff contends that the trial court had no jurisdiction to assess damages upon a suggestion filed after the dismissal of the proceedings. This contention is a meritorious one. Sec. 12, ch. 86, Ill. Code Bar states, 1935, reads as follows:

"In all cases where an injunction is dissolved by any court of chancery in this state, the court, after dissolving such injunction, and before finally disposing of the suit, upon the party claiming damages by reason of such injunction presenting in writing, the nature and amount thereof, shall hear evidence and assess such damages as the nature of the case may require, and to equity applicants, to the party dissatisfied by such injunction, and may award execution to collect the same: Provided, a failure so to assess damages shall not operate as a bar to an action upon the injunction bond."

Plaintiff dismissed the suit on November 6, 1935, leave was not granted defendant to file its suggestion of damages until December 1, and the order assessing damages was not entered until December 12, 1935. Suggestions of damages may be filed, upon leave, at any time before a decree is filed, and it has been held that where that is done a trial court, by reserving in the decree the question of the assessment of damages for a further hearing, retains jurisdiction for the purpose of hearing and determining the said question. But here leave was given to file the suggestion of damages nearly a month after the entry of the final order. The motion and the suggestion of damages therefore came too late. Had the trial court, on December 2, vacated the decree of November 6, he might then have properly granted leave to defendant to file its suggestion of damages, and he might also, upon a hearing held before or after the re-entry of the decree dismissing the suit, have assessed an

order in reference to the suggestion of damages; but this procedure was not followed.

The judgment order of the Circuit court of Cook county of December 12, 1935, is reversed.

JUDGMENT ORDER OF DECEMBER 12,
1935, REVERSED.

Sullivan, P. J., and Friend, J., concur.

order in reference to the question of damages; but this

procedure was not followed.

The judgment order of the District Court of Cook

County of December 12, 1885, is reversed,

JUDGMENT ORDER OF DECEMBER 12,
1885, REVERSED.

WILLIAM, T. J., and FRANK, T., contra.

38862

JOHN H. VICTOR,
Appellant,

v.

R. BERNARD KURZON, ALEX
FREUNDLUCH and CHARLES
IZENSTARK,
Appellees.

102
APPEAL FROM CIRCUIT COURT,
COOK COUNTY.

287 I.A. 634¹

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Plaintiff sued defendants to recover damages on account of the alleged fraud of defendants in connection with the exchange of two pieces of real estate, both located in Chicago. Defendants filed a motion to strike plaintiff's complaint and amendment thereto, which motion was allowed, and plaintiff electing to stand on his complaint, as amended, the court entered a judgment for costs against plaintiff.

Paragraph First of the amendment to the complaint alleges:

"Seventh: That at least thirty (30) days prior to the execution of said contract of exchange, the exact date of which the plaintiff is unable to state, the said defendants, to induce the plaintiff to make such exchange, fraudulently, maliciously and falsely submitted to plaintiff plans and specifications for the apartment building located on the premises described in the second paragraph hereof, in which it was shown that the said apartment building was fully equipped with and that there had been erected therein an approved automatic pump, having a capacity of not less than 500 gallons per minute to supply the standpipe with water, which was a full compliance with and in accordance with the fire ordinance of the City of Chicago regulating the construction of such an automatic pump in apartment buildings of the size and character of the one erected on the premises described in the second paragraph hereof, which plans and specifications are made a part hereof by reference and copies of the relevant or material parts of said plans and specifications are hereto attached, marked Exhibits 'A' and 'B' and made a part hereof."

JOHN H. VICTOR,
Appellant,

v.

H. BERNARD KUNSON, ALK.
FRANCIS and CHAS. H.
KUNSTLER,
Appellees.

ALL IN THE CIRCUIT COURT,
COOK COUNTY.

2871 A. 634

MR. JUSTICE SCHEIDT DELIVERED THE OPINION OF THE COURT.

Plaintiff sued defendants to recover damages on account of the alleged fraud of defendants in connection with the exchange of two pieces of real estate, both located in Chicago. Defendants filed a motion to strike plaintiff's complaint and amendment thereto, which motion was allowed, and plaintiff elected to stand on his complaint, as amended, the court entered a judgment for costs against plaintiff.

Paragraph First of the amendment to the complaint alleges:

"Seventh: That at least thirty (30) days prior to the execution of said contract of exchange, the exact date at which the plaintiff is unable to state, the said defendants, to induce the plaintiff to make such exchange, fraudulently, maliciously and falsely submitted to plaintiff plans and specifications for the apartment building located on the premises described in the second paragraph hereto, in which it was shown that the said apartment building was fully equipped with all that there and been erected therein an approved automatic pump, having a capacity of not less than 500 gallons per minute to supply the standpipe with water, which was a full compliance with and in accordance with the fire ordinance of the city of Chicago regulating the construction of such an automatic pump in apartment buildings of the size and character of the one erected on the premises described in the second paragraph hereto, which plans and specifications were made a part of the contract by reference and copies of the relevant or material parts of said plans and specifications are hereto attached, marked 'A' and 'B' and made a part hereof."

Exhibit "A" is a plan or plat of the basement floor of defendants' apartment building, which shows fire service equipment. Exhibit "B" contains the specifications and requirements of "Fire Pump Equipment." Paragraph Eighth of the complaint alleges:

"That the portions of said plans and specifications showing that said apartment building was fully equipped with and that there had been erected therein an automatic pump or sprinkler system, were false and untrue and were known to the defendants to be false and untrue, and that said plans and specifications were submitted to the plaintiff with the intention and purpose of making the plaintiff believe that the said apartment building was equipped with and that there had been erected therein a sufficient automatic pump or sprinkler system, all of which were known to the said defendants to be false and untrue, and were made with the intent and purpose of deceiving plaintiff into executing the said contract for the exchange of said properties."

Paragraph Ninth alleges:

"That the plaintiff believing and relying upon the truth of the statements and showing with reference to such automatic pump or sprinkler system, as contained in said plans and specifications, as hereinbefore alleged, executed the said contract of sale and subsequently carried out and performed said contract of sale by conveying the property owned by him and described in the first paragraph hereof to the Foreman Trust and Savings Bank, as trustee, and received the conveyance of the property described in the second paragraph hereof from the said Foreman Trust and Savings Bank, as trustee."

The plans and specifications have upon their face the following:

"R. Bernard Kurzon Architect." R. Bernard Kurzon is one of the defendants in the action. The complaint, as amended, also contains allegations to the effect that because no such pump had been erected by defendants in the apartment building plaintiff was compelled by the authorities of the city of Chicago to erect, at his own expense, such a pump in the building, in compliance with Section 1301 of the Fire Prevention Ordinances of the City of Chicago.

Defendants' motion to strike was based upon the following grounds:

Exhibit "A" is a plan or plat of the basement floor of defendant's apartment building, which shows fire service equipment. Exhibit "B" contains the specifications and requirements of "Fire Pump Equipment." Paragraph Ninth of the complaint

alleges:

"That the portions of said plans and specifications showing that said apartment building was fully equipped with and that there had been erected therein an automatic pump or sprinkler system, were false and untrue and were known to be false and untrue, and that said plans and specifications were submitted to the plaintiff with the intention and purpose of making the plaintiff believe that the said apartment building was equipped with and that there had been erected therein a sufficient automatic pump or sprinkler system, all of which were known to the said defendant to be false and untrue, and were made with the intent and purpose of deceiving plaintiff into executing the said contract for the exchange of said properties."

Paragraph Ninth alleges:

"That the plaintiff believing and relying upon the truth of the statements and showing with reference to such automatic pump or sprinkler system, as contained in said plans and specifications, as heretofore alleged, executed the said contract of sale and subsequently carried out and performed said contract of sale by conveying the property owned by him and described in the first paragraph hereto to the Foreman Trust and Savings Bank, as trustee, and received the conveyance of the property described in the second paragraph hereto from the said Foreman Trust and Savings Bank, as trustee."

The plans and specifications have upon their face the following:

R. Bernard Kuxon Architect." R. Bernard Kuxon is one of the defendants in the action. The complaint, as amended, also contains allegations to the effect that because no such pump had been erected by defendant in the apartment building plaintiff was compelled by the authorities of the City of Chicago to erect at his own expense, such a pump in the building, in compliance with Section 1301 of the Fire Prevention Ordinance of the City of Chicago.

Defendants' motion to strike was based upon the following grounds:

"1. The said Complaint does not set forth a cause of action.

"2. The 'submission of plans and specifications' alleged to have been 'submitted to the plaintiff with the intention and purpose of making the plaintiff believe that the apartment building was equipped with, and that there had been erected therein, a sufficient automatic pump or sprinkler system' is not sufficient in law for the plaintiff to maintain his action.

"3. Paragraph 9 of the Complaint charges that 'the plaintiff believing and relying upon the truth of the statements and showing with reference to such automatic pump or sprinkler system, as contained in said plans and specifications' - but nowhere in the plaintiff's complaint does it appear or does it charge that the defendants or any of them made any statements or representations to the plaintiff."

Plaintiff contends that the court erred in sustaining the motion of defendants to strike or dismiss the complaint, as amended; in dismissing the cause of action, and entering judgment for the defendants for costs.

As to the three grounds upon which defendants based their motion to strike: Ground 1 need not be considered for the reason that it is not in compliance with sec. 45 (1), par. 173, of the Practice act, which provides, in part, that "such motion shall point out specifically the defects complained of." Grounds 2 and 3 are apparently based upon the theory that the submission of false plans and specifications of the apartment building, even though they were submitted with the intention and purpose of making plaintiff believe that the apartment building was equipped with and that there had been erected therein a sufficient automatic pump or sprinkler system, would not be sufficient upon which to base a charge of actionable fraud; that the mere submission of false plans and specifications to plaintiff, even with the intent and purpose of making him believe that the apartment building was equipped with a sufficient automatic pump or sprinkler system, unaccompanied by any statements of defendants to plaintiff in reference to the same, would not constitute actionable fraud. Plaintiff

"1. The said Complaint does not set forth a cause of

action.

"2. The 'explanation of plans and specifications' alleged to have been 'submitted to the Plaintiff with the intention and purpose of making the Plaintiff believe that the apartment building was equipped with, and that there had been erected therein, a sufficient automatic pump or sprinkler system' is not sufficient in law for the Plaintiff to maintain his action.

"3. Paragraph 9 of the Complaint charges that the Plaintiff believing and relying upon the truth of the statements and showing with reference to the pump or sprinkler system, as contained in said plans and specifications, - but nowhere in the Plaintiff's complaint does it appear or does it charge that the defendant or any of them made any statement or representations to the Plaintiff."

Plaintiff contends that the court erred in sustaining the motion of defendant to strike or dismiss the complaint, and in dismissing the cause of action, and entering judgment for the defendant for costs.

As to the three grounds upon which defendant based their motion to strike: Ground 1 need not be considered for the reason that it is not in compliance with G. S. (I.), par. 173, of the justice act, which provides, in part, that "such motion shall point out specifically the defect complained of." Grounds 2 and 3 are apparently based upon the theory that the omission of plans and specifications of the apartment building, even though they were submitted with the intention and purpose of making Plaintiff believe that the apartment building was equipped with and that there had been erected therein a sufficient automatic pump or sprinkler system, would not be sufficient upon which to base a charge of actionable fraud; that the mere omission of plans and specifications to Plaintiff, even with the intent and purpose of making him believe that the apartment building was equipped with a sufficient automatic pump or sprinkler system, accompanied by any statement or defendant to Plaintiff in reference to the same, would not constitute actionable fraud. Plaintiff

concedes that it must be assumed from the pleadings that there were no oral false statements made by defendants to plaintiff and that the latter's case is based upon the misstatements contained in the plans and specifications.

"Fraud in its generic sense, especially as the word is used in courts of equity, comprises all acts, omissions, and concealments involving a breach of legal or equitable duty and resulting in damage to another. Fraud has also been defined as cunning or artifice used to cheat or deceive another." (26 C. J. 1059.)

"Fraud may be found from a variety of circumstances. There is no general rule for determining what facts will constitute it, but it is to be found or not according to the special facts of each particular case. It may consist in a misrepresentation, that is, in the positive assertion of a falsehood, or in the creation of a false impression by words or acts, or by any trick or device, or in a concealment or suppression of the truth, or in both a suggestion of falsehood and a suppression of truth together. And it matters not, so far as the right of action is concerned, whether the means of accomplishing the deception be complex or simple - a deep-laid scheme of swindling or a direct falsehood - a combined effort of a number of associates or the sole effort of a solitary individual - provided the deception is effected and the damage complained of is the consequence of the deception." (12 R. C. L. 232. Italics ours.)

"The Century Dictionary defines fraud as 'an act or course of deception deliberately practiced with the view of gaining a wrong or unfair advantage; deceit; trick; an artifice by which the right or interest of another is injured.' In Story's Equity Jurisprudence (vol. 1, secs. 186, 187,) it is stated that fraud, in its general sense, comprises all acts, omissions and concealments involving a breach of legal or equitable duty, trust or confidence and resulting in damage to another. This definition is approved in Dyersey v. Johnson, 93 Ill. 547, and 26 Corpus Juris, 1059. Bouvier's Law Dictionary (vol. 1, p. 843,) states that active and positive fraud includes cases of the intentional and successful employment of any cunning, deception or artifice to circumvent, cheat or deceive another." (Wilson v. Wilborn, 335 Ill. 352, 357-8. Italics ours.)

"The charge in this case is fraud - that the judgment was procured as a fraud upon the city and that the assignment of the cause of action was a fraud upon Dora Sampson. Fraud includes anything calculated to deceive, whether it be a single act or combination of circumstances, whether the suppression of truth or the suggestion of what is false, whether it be by direct falsehood or by innuendo, by speech or by silence, by word of mouth or by look or gesture. (Bishop's Equity, 206.)" (People v. Gilmore, 345 Ill. 28, 46. Italics ours.)

"* * * "If one conducts himself in a particular way, with the object of fraudulently inducing another to believe in the existence of a certain state of things, and to act upon the basis of its existence, and damage resulted therefrom to the party misled, he who misled him will be just as liable as if he had misrepresented the facts in express terms." Northeastern

Railway Co. v. Wanless, L. R. 7 H. L. 12; Downey v. Finucane, 205 N. Y. 251 [98 N. E. 391, 40 L. R. A. (N. S.) 307.] * * *
(Pennebaker v. Kimble, 269 Pac (Or.) 981, 984. *Italics ours.*)

"Counsel further contends there is no allegation that the defendant ever knew the plaintiff or ever made any representations of any sort to her. It is true, the representations were not by means of conversations between the parties; but the rule is as stated in the Law of Fraud, by Bigelow, (p. 467,) that a representation is anything short of a warranty, 'proceeding from the action or conduct of the party charged, which is sufficient to create upon the mind a distinct impression of fact, conducive of action. The most usual and obvious example is an oral, written or printed statement. But statement is by no means necessary. Any conduct capable of being turned into a statement of fact is a representation. There is no distinction between misrepresentations effected by words and misrepresentations effected by other acts. It is sufficient that there were acts such as to mislead a reasonably cautious or prudent man in regard to the existence of a fact forming a basis of or contributing an inducement to some change of position by him.' In this case, the recitals in the deeds and trust deed, stating a consideration which inferred that the property was of great value whereas the interest of the defendant therein was of no value whatever; the memorandum on the notes that they were secured 'by a trust deed to Chicago Title and Trust Company, trustee, of even date herewith, on seven-story and basement building, No. 188 East Monroe street, city of Chicago,' implying that the trust deed conveyed the fee simple title; the recital in the trust company's certificate that these notes were a part of a series of notes amounting to \$75,000, 'secured by trust deed,' and likewise the statement that 'in consideration of the interest being paid in full the time is extended to May 1, 1899,' signed by Miller, are in law representations calculated to deceive and mislead any third persons dealing with those notes. Especially is the statement by Miller misleading and deceptive. It amounted to a statement that the notes were originally given to him as a part, only, of the purchase price for the property; and that statement, taken with the recitals of consideration \$100,000, naturally leads to the inference that he received \$25,000 of the purchase price in money and \$75,000 in said notes." (Leonard v. Springer, 197 Ill. 532, 538-9.)

"A person who, by conduct, contributes to the misapprehension of another as to a material matter, and intentionally fails to correct the misapprehension, is guilty of a fraud." (Bell v. Felt, 102 Ill. App. 218, 227.)

be
 "A false representation need not necessarily be an oral, printed or written statement, but may arise from any conduct capable of being turned into a statement of fact; and negligence cannot be imputed to a defrauded party, so that he who commits the fraud may escape liability." (Smith v. Niemann, 216 Ill. App. 179, 185. *Italics ours.*)

"Implied Representations; Maps and Plats. - To constitute a misrepresentation it is not essential that there be a direct affirmation as to the existence of a certain state of facts. This is exemplified in the cases where maps and plats are exhibited which purport to show the general characteristics and surroundings of the land, as where in case of a sale of timber land a map or plat of the land is exhibited showing a fine stream of water and

a mill site which were essential to the marketing of the timber, whereas in fact the indicated stream was merely a gully carrying water only a small part of the year; or where in the sale of town lots in a new development a map is exhibited by the vendor showing a street material for access to the lots, which in fact did not exist or was a private way laid out by others on their own land." (27 R. C. L. 364-5.)

In State v. Gaillard, 1 Am. Dec. (S. C.) 628, the alleged fraud consisted of a false showing on a plat. The court, in holding that the purchaser had a right to rely on the plat, states (p. 631):

"The plat produced at this sale represented upon the face of it these essential requisites. It carried, therefore, a falsehood and misrepresentation in its front, well calculated to take in and deceive unwary men, who were likely to trust to such representations made by public men in the execution of a public trust. There was nothing better calculated to impose upon a purchaser than a plat which had the appearance of an actual survey and observation, with explanatory notes made upon it." (Italics ours.)

In Chatham Furnace Co. v. Moffatt, 18 N. E. (Mass.) 168, the court held that a purchaser of property had a right to rely upon the accuracy of a survey of the premises submitted to him. In McCall v. Davis, 56 Pa. St. 431, in holding that the vendor of property was bound by the plan and plat of a subdivision which he exhibited to the bidders, the court said (p. 434):

"When, therefore, Davis produced his plot to the bidders at the public sale, exhibiting East street as one of the streets in his plan, and referring to nothing on its face to correct this impression or to inform the bidders that it was laid out by others on their own ground, it was an act which affirmed, as loudly as words could speak, that this was a street dedicated by him to the use of those who should become purchasers of his lots. It was an affirmation of a positive fact, which if material entered directly into the consideration of the purchase; and if false is a ground of relief in equity, when its falsity was unknown to the purchaser and when he has taken no covenant to protect himself." (Italics ours.)

In Hicks v. Stevens, 121 Ill. 186, wherein one of the elements of alleged fraud consisted of statements made in printed circulars in reference to the patent or invention involved in the case, the court said (p. 197):

"There was no error in admitting in evidence the printed circular of Hicks, showing the valuable qualities of his invention. The proof shows that he gave Stevens one of them during their negotiations, containing material and important representations

A mill site which was essential to the marketing of the timber, whereas in fact the indicated stream was merely a mill carrying water only a small part of the year; or there in the case of some lots in a new development a map is exhibited by the vendor showing a street material for access to the lots, which in fact did not exist or was a private way laid out by owners on their own land." (24 R. C. E. 384-5.)

In State v. Galliard, 1 Am. Dec. (S. C.) 68, the alleged fraud consisted of a false showing on a plat. The court, in holding that the purchaser had a right to rely on the plat, stated (p. 631)

"The plat produced at this sale represented upon the face of it these essential particulars. It carried, therefore, a false hood and misrepresentation in its front, well calculated to take in and deceive unwary men, who were likely to want to such representations made by public men in the execution of a public trust. There was nothing better calculated to inspire a man's purchase than a plat which had the appearance of an actual survey and observation, with explanatory notes made upon it." (11 Mass. (Cours.)

In Oshtemo Furman Co. v. McCall, 134 U. S. 116, the court held that a purchaser of property had a right to rely upon the accuracy of a survey of the premises submitted to him. In McCall v. Davis, 56 Pa. St. 431, in holding that the vendor of property was bound by the plan and plat of a subdivision which he submitted to the bidders, the court said (p. 434):

"When, therefore, Davis produced his plat to the bidders at the public sale, exhibiting what stated as one of the streets in his plan, and consenting to no change in the plat to correct this impression or to inform the bidders that it was laid out by others on their own ground, it was an act which amounted, as largely as words could speak, that this was a street dedicated by him to the use of those who should purchase parcels of his lots. It was an affirmation of a positive fact, which it would be entirely in the discretion of the purchaser, and it was a ground of relief in equity, when the latter was unknown to the purchaser and when he had taken no covenant to protect himself." (11 Mass. (Cours.)

In Hicks v. Brown, 141 Ill. 186, wherein one of the elements of alleged fraud consisted of statements made in printed circulars in reference to the patent or invention involved in the case, the court said (p. 187):

"There was no error in committing in evidence the printed circular of Hicks, showing the valuable character of his invention. The proof shows that he gave several such circulars to their negotiation, containing partial and important representations."

of what his invention would accomplish as a means of saving steam and fuel, - that it would save its cost in a month, - while the proof showed that, practically, it was of no value in the respect mentioned in the circular. These circulars were printed and distributed for the purpose of inducing others to purchase rights of him, and the statements therein may be regarded as of a more deliberate character than if made in a conversation. They were properly admitted. See 2 Pomeroy's Eq. Jur. Sec. 881, and also Cooley on Torts, 477." (*Italics ours.*)

After a careful consideration of the allegations of the complaint, as amended, and the authorities bearing upon the question now before us, we are satisfied that the complaint, as amended, makes out a prima facie case of actionable fraud and that the court erred in striking the complaint, as amended, dismissing the cause of action, and entering judgment for costs for defendants.

In this court defendants contend that it must be assumed from the allegations of the complaint, as amended, that plaintiff had an opportunity to examine the defendants' property; that no facts are alleged in the complaint, as amended, to show that plaintiff had a right to rely on the representations of defendants; and that in the absence of such allegations the law requires that plaintiff, in the exercise of prudence and care, should have examined defendants' property before he consummated the deal. No such point was made in defendants' motion to strike. Had defendants raised such point in support of their motion to strike, if he deemed it necessary, plaintiff might then have amended the complaint in that regard. Moreover, a party guilty of fraudulent conduct whereby he induces another to act will not be allowed to impute negligence to the latter as against his own deliberate fraud. (Pustelniak v. Vilimas, 352 Ill. 270. See also Antle & Bro. v. Sexton, 137 Ill. 410, 413-4; Linington v. Strong, 107 Ill. 295, 302-3; Herpich v. Williams, 300 Ill. 540, 545-6;

of what his invention would accomplish as a means of saving steam and fuel, - that it would save its cost in a month, - this the proof showed that, practically, it was of no value in the respect mentioned in the statement. These circumstances were printed and distributed for the purpose of inducing others to purchase it. It was also the fact that it was in a newspaper, a copy of which was properly admitted. See 2. Bennett's No. 3,000,000, and also Cooley on Torts, 477. (Italian case.)

After a careful consideration of the allegations of the

complaint, as amended, and the authorities bearing upon the question now before me, we are satisfied that the complaint, as amended, makes out a prima facie case of tortious fraud, and that the court erred in striking the complaint, as amended, dismissing the cause of action, and entering judgment for costs for defendants.

In this court defendants contend that it must be shown

from the allegations of the complaint, as amended, that plaintiff had an opportunity to examine the defendants' property; that no facts are alleged in the complaint, as amended, to show that

plaintiff had a right to rely on the representations of defendants; and that in the absence of such allegations the law requires that

plaintiff, in the exercise of prudence and care, should have examined defendants' property before he consummated the deal.

It is said that such point was made in defendants' motion to strike. And

defendants raised such point in support of their motion to strike. It is deemed unnecessary, plaintiff might then have amended the

complaint in that regard. Moreover, a party guilty of fraud cannot object that he induced another to act will not be allowed to

impute negligence to the latter as against his own deliberate

fraud. (Pratt v. Pratt, 322 Ill. 470. See also Wells

10. v. Benton, 127 Ill. 410, 412-4; Wells v. Wells, 107

Ill. 222, 202-3; Wells v. Wells, 300 Ill. 340, 343-4;

Carver v. VanArsdale, 312 Ill. 220, 230.)

The judgment of the Circuit court of Cook county is reversed, and the cause is remanded with directions to the trial court to overrule the defendants' motion to strike the complaint, as amended.

JUDGMENT REVERSED, AND CAUSE
REMANDED WITH DIRECTIONS.

Sullivan, P. J., and Friend, J., concur.

Greaver v. VanArsdale, 212 Ill. 230, 230.)

The judgment of the Circuit Court of Cook County is reversed, and the cause is remanded with directions to the trial court to overrule the defendant's motion to strike the complaint, as amended.

JUDGMENT REVERSED, AND CAUSE
REMANDED WITH DIRECTIONS.

Delivered, P. J., and Friend, J., concur.

39008

TONY MACHINSKI and KATIE
MACHINSKI,
Appellees,

v.

TOM DULAK and WALTER H.
FISHER,
Appellants.

103
APPEAL FROM SUPERIOR COURT,
COOK COUNTY.

287 I.A. 634²

MR. JUSTICE DEARLAK DELIVERED THE OPINION OF THE COURT.

Tony Machinski and Katie Machinski, his wife, sued Tom Dulak and Walter H. Fisher in an action of fraud and deceit. A jury returned a verdict finding defendants guilty and assessing plaintiffs' damages at the sum of \$1,800. To the following question submitted to them by the court, "Did the defendants, Tom Dulak and Walter H. Fisher, wilfully, maliciously, falsely and fraudulently deceive and defraud the plaintiffs as charged in the declaration?" the jury answered, "Yes." Defendants appeal from a judgment entered upon the verdict.

This was the second trial of the cause. In the first, one by the court without a jury, defendants were found guilty and plaintiffs' damages were assessed at the sum of \$1,814.40. Upon an appeal from the judgment entered upon the finding we reversed the judgment and remanded the cause for a new trial upon the sole ground that there had not been an orderly and proper trial of the cause.

The declaration alleges, in substance, that plaintiffs were induced to convey to James Volney and Anna Volney, his wife, their farm in Wisconsin in exchange for certain real estate in Chicago by false and fraudulent representations made by defendants to plaintiffs in reference to the Chicago property, whereby plaintiffs were deceived and damaged.

20 JUL 82

1. The first of these is the fact that the majority of the population of the United States is of European descent. This is a fact which has been recognized for many years, and it is one of the reasons why the United States has been able to maintain its position as a world power. The second of these is the fact that the United States has a large and growing population of non-European descent. This is a fact which has also been recognized for many years, and it is one of the reasons why the United States has been able to maintain its position as a world power. The third of these is the fact that the United States has a large and growing population of non-European descent. This is a fact which has also been recognized for many years, and it is one of the reasons why the United States has been able to maintain its position as a world power.

The attorney who appears for defendants in this court upon the instant appeal took no part in either of the trials in the lower court.

Defendants contend that "the amended declaration does not state a cause of action." It appears that some months after the first judgment was entered plaintiffs, by stipulation of the parties, were permitted to file an amended declaration. Upon the first appeal, however, defendants contended that the case was tried upon the original declaration. Upon the second trial defendants contended that by agreement of the parties the amended declaration was not a part of plaintiffs' case. In this court they argue that the so-called amended declaration was the declaration upon which the case was tried. The instant contention is merely an afterthought. In the lower court the sufficiency of neither the so-called amended declaration nor the original declaration was ever directly questioned by defendants even in their written motion for a new trial, and they are forced to rely upon their formal motion in arrest of judgment in support of their contention that the amended declaration does not state a cause of action. While it is true that when a declaration is so defective that it will not sustain a judgment such defect may be availed of on motion in arrest of judgment, nevertheless, defendants, in view of their position in the lower court, are in no position to raise the instant question. But assuming that they have the right to raise it, we find no substantial merit in it. The point made by defendants is that the amended declaration does not specifically allege that the deal between plaintiffs and the Wolneys was ever consummated by the Wolneys' transferring the Chicago property to plaintiffs. The original declaration undoubtedly contains sufficient allegations in that regard, and that is, of course, the reason why defendants are now claiming that the case was tried upon the amended declaration. It may be

THE HISTORY OF THE UNITED STATES OF AMERICA
FROM 1763 TO 1876

BY

JOHN P. KENNEDY

AND

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THE HISTORY OF THE UNITED STATES OF AMERICA

conceded that the amended declaration does not allege the fact that the Wolneys conveyed the Chicago property to plaintiffs, as clearly as the original declaration, nevertheless, we think that the amended declaration is not so defective in that regard that it will not sustain a judgment. Before verdict the intendments are against the pleader, and upon demurrer to a declaration nothing will suffice, by way of inference or implication, in his favor; but on motion in arrest of judgment the court will intend that every material fact alleged in the declaration, or fairly and reasonably inferable from what is alleged, was proved at the trial; and if, from the issue, the fact omitted and fairly inferable from the facts stated in the declaration may fairly be presumed to have been proved, the judgment will not be arrested.

"Where a matter is so essentially necessary to be proved that had it not been given in evidence the jury could not have given such a verdict, then the want of stating that matter in express terms in the declaration, provided it contains terms sufficiently general to comprehend it in fair and reasonable intendment, will be cured by verdict." (Pennsylvania Co. v. Elliott, 132 Ill. 654, 663.)

We are satisfied that it is fairly and reasonably inferable from what is alleged in the amended declaration that the Wolneys conveyed the Chicago property to plaintiffs in consummation of the deal, and upon the trial defendants conceded that the Wolneys did so transfer. Where a plaintiff has a good cause of action, even though it be defectively stated, judgment will not be arrested after pleas are filed to the merits and a verdict has been returned. In the instant case plaintiffs had a good cause of action, defendants filed pleas to the merits, and a verdict has been returned.

Defendants contend that "plaintiffs failed to make out a case by their testimony in chief," and that the court erred in not instructing the jury to find for defendants at the close of plaintiffs' case. It is sufficient to say, in answer to this contention, that when the court overruled their motion for a peremptory instruction at the close of plaintiffs' evidence, they offered evidence in

1. The first of these is the fact that the Commission has not yet received any information from the Government of the United States regarding the activities of the Committee for the Liberation of the People of the East (CLPE) in the United States. The Commission is therefore unable to determine whether the CLPE is a genuine organization or a front organization for the Soviet Union.

1. The first of these is the fact that the majority of the population of the United States is of European descent. This is a fact which has been recognized by the government and the people of the United States for many years. It is a fact which has been recognized by the government and the people of the United States for many years. It is a fact which has been recognized by the government and the people of the United States for many years.

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their behalf, and they, therefore, waived their motion. However, even if the instant contention had not been waived we would be forced to find no merit in it.

The further contention of defendants that the evidence shows that defendants did not defraud plaintiffs and that the verdict is contrary to the evidence, does not appeal to us. The trial court upon the first trial, and a jury upon the second, found the issues for plaintiffs. The trial court, upon the second trial, approved the verdict. There are certain facts and circumstances in the case that satisfy us that plaintiffs' claim is a just one. We certainly would not be warranted in holding that the verdict is manifestly against the weight of the evidence.

We find no merit in the further contention that "no damages were proven by plaintiffs."

Plaintiffs' motion to dismiss the appeal is denied.

This case seems to have been ably and fairly tried and the record is free from errors usually assigned in a proceeding of this kind.

The judgment of the Superior court of Cook county is affirmed.

JUDGMENT AFFIRMED.

Sullivan, P. J., and Friend, J., concur.

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39045

EDWARD BRYNIARSKI, by his next
friend, EUGENE GRAJEWSKI,
Appellee,

v.

PEOPLES FINANCE COMPANY, a
corporation,
Appellant.

104
APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

287 I.A. 634³

MR. JUSTICE BOANLAN DELIVERED THE OPINION OF THE COURT.

Edward Bryniarski, by his next friend, Eugene Grajewski, plaintiff, sued the Peoples Finance Company, a corporation, defendant. The case was tried by the court and there was a finding and judgment entered against defendant for \$352.08. Defendant appeals.

On October 27, 1934, plaintiff, Edward Bryniarski, purchased from defendant an Auburn automobile and paid therefor the sum of \$299.55. On October 25, 1935, he traded that automobile to defendant for a Continental sedan, for which he paid, in cash, the sum of \$28.50; received a trade allowance of \$125 on the Auburn automobile; and the balance of \$475 was secured by eleven notes of \$25 each and one note for \$200. Thereafter he paid the first of the \$25 notes. On January 7, 1935, plaintiff, being unable to proceed with the contract, returned the automobile to defendant. In the instant suit plaintiff alleges that on October 27, 1934, he was under the age of twenty-one years and he "elects to terminate any and all liability by reason of contracts and elects to recover said sums as aforesaid." In defendant's affidavit of verity it denied that plaintiff on October 27, 1934, was under the age of twenty-one years.

Defendant states: "The sole and only question in this case is as to whether or not the plaintiff was an infant at the

MASSACHUSETTS, by the said
JAMES M. HARRIS, Clerk of the
Court, do hereby certify that
the within and foregoing is a
true and correct copy of the
original as the same appears
in the files of the Court.

1783.A.183

time of entering into the contracts with the defendant." Plaintiff concedes that the burden of proving his infancy by a preponderance of the evidence was upon him. Defendant's sole contention is that "the plaintiff failed to prove by a preponderance of the evidence the fact that he was a minor." In passing upon this contention we have seen fit to read the entire stenographic report of the proceedings before the trial court, and after a careful consideration of all the facts and circumstances we are satisfied that we cannot hold that the finding of the trial court is manifestly against the weight of the evidence.

The judgment of the Municipal court of Chicago is affirmed.

JUDGMENT AFFIRMED.

Sullivan, F. J., and Friend, J., concur.

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39181

PEOPLE OF THE STATE OF
ILLINOIS,

Defendant in Error,

vs.

OTTO R. DANNIES,

Plaintiff in Error.

105
ERROR TO MUNICIPAL COURT
OF CHICAGO.

287 I.A. 634⁴

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

On June 7, 1935, a verified information was filed against defendant, in the Municipal court of Chicago, which charges that he, on May 7, 1935, in the city of Chicago "willfully and unlawfully did make, draw, utter and deliver to this affiant a certain bank check for the payment of money, drawn upon Mid-City National Bank, City of Chicago, and did thereby obtain from this affiant the sum of Fifteen and 00/100 Dollars, lawful money of the United States of America, the personal goods, money and property of the aforesaid Edward Tess, this affiant, the said Otto R. Dannies then and there well knowing at the time of making, drawing, uttering and delivery of the aforesaid check, that he did not then and there have sufficient funds on deposit in the said bank, or credit with said bank for payment in full of aforesaid check upon its presentation in due course of business at said bank, all with the intent then and there to cheat and defraud the said Edward Tess this affiant, contrary to the form of the Statute in such case made and provided, and against the peace and dignity of the People of the State of Illinois." As soon as ^{the} information was filed defendant was brought to trial. He plead not guilty, waived a trial by jury and the cause was tried by the court. No transcript of the evidence has been filed in this court. At the conclusion of the hearing a judgment was entered which adjudged "that said defendant is guilty of the criminal offense of obtaining money by means of false pretenses

PEOPLE OF THE STATE OF ILLINOIS,

Defendant in Error,

vs.

OTTO R. DANNIS,

Plaintiff in Error.

FOR TO MUNICIPAL COURT

OF CHICAGO.

MR. JUSTICE SAGAN DELIVERED THE OPINION OF THE COURT.

On June 7, 1935, a verified petition was filed against defendant, in the Municipal Court of Chicago, which charges that he, on May 7, 1935, in the city of Chicago "willfully and unlawfully did make, draw, utter and deliver to this plaintiff a certain bank check for the payment of money, drawn upon the City National Bank, City of Chicago, and did thereby obtain from this plaintiff the sum of fifteen and 00/100 Dollars, lawful money of the United States of America, the personal goods, money and property of the plaintiff Edward Teas, this plaintiff, the said Otto R. Dannis then and there well knowing at the time of making, drawing, uttering and delivery of the aforesaid check, that he did not then and there have sufficient funds on deposit in the said bank, or credit with said bank for payment in full of aforesaid check upon its presentation in the course of business at said bank, all with the intent then and there to cheat and defraud the said Edward Teas this plaintiff, contrary to the form of the Statute in such case made and provided, and against the peace and dignity of the People of the State of Illinois." As soon as information was filed defendant was brought to trial. He pled not guilty, waived a trial by jury and the case was tried by the court. No transcript of the evidence has been filed in this court. At the conclusion of the hearing a judgment was entered which stated "that said defendant is guilty of the criminal offense of obtaining money by means of false pretenses."

with intent to cheat and defraud on said finding of guilty," and defendant was sentenced to confinement in the House of Correction for the term of one year and to pay a fine of one dollar and the costs of the suit. To reverse the judgment defendant has sued out this writ of error.

The reason for the failure of The People to file an appearance or a brief in this court is obvious. The information charges defendant with the violation of par. 164 of the Criminal Code, "An Act to punish the making, drawing, uttering or delivering of checks, drafts or orders for the payment of money with intent to defraud," but the judgment adjudges the defendant guilty of an entirely different offense, viz., obtaining money by means of false pretenses with intent to cheat and defraud. (See par. 228, Criminal Code.) A defendant cannot be lawfully sentenced for an offense not charged in the indictment or information.

The judgment of the Municipal court of Chicago is reversed, and the cause is remanded for a proper disposition of the case.

JUDGMENT REVERSED AND CAUSE REMANDED.

Sullivan, P. J., and Friend, J., concur.

with intent to cheat and defraud on said finding of guilty, and defendant was sentenced to confinement in the house of correction for the term of one year and to pay a fine of two dollars and costs of the suit. To reverse the judgment defendant has moved out this writ of error.

The reason for the failure of the people to file an appearance or a brief in this court is obvious. The information charges defendant with the violation of part 104 of the Criminal Code, "An Act to punish the making, drawing, signing or delivering of checks, drafts or orders for the payment of money with intent to defraud," but the judgment adjudges the defendant guilty of an entirely different offense, viz., obtaining money by means of false pretenses with intent to cheat and defraud. (See part 238, Criminal Code.) A defendant cannot be lawfully sentenced for an offense not charged in the indictment or information. The judgment of the Municipal court of Chicago is reversed, and the cause is remanded for a proper disposition of the case.

SHAW, P. J., and FRIEND, J., concur.

9106
6/17
AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the sixth day of October, in
the year of our Lord one thousand nine hundred and thirty-six,
within and for the Second District of the State of Illinois:

Present -- the Hon. BLAINE HUFFMAN, Presiding Justice.

Hon. FRANKLIN R. DOVE, Justice.

Hon. FRED G. WOLFE, Justice.

JUSTUS L. JOHNSON, Clerk.

RALPH H. DESPER, Sheriff.

287 I.A. 635¹

BE IT REMEMBERED, that afterwards, to-wit: On

NOV 30 1936

the opinion of the Court was filed in the

Clerk's office of said Court, in the words and figures

following, to-wit:

IN THE APPELLATE COURT OF ILLINOIS
SECOND DISTRICT
OCTOBER TERM, A. D. 1936.

BAHR CHEESE COMPANY, a)	
Corporation,)	
)	
vs.	)	Appellee,
)	
FREDA RENTER,)	
)	
	)	Appellant.)

APPEAL FROM CIRCUIT COURT
STEPHENSON COUNTY.

HUFFMAN - P.M.

Appellee brought its bill of complaint against appellant and others, for an accounting and other relief, praying that an injunction be issued restraining appellant from voting 55 shares of stock of the F. J. Kolb Cheese Company, at any meeting or meetings held by said company. Pursuant to the complaint and affidavit, a temporary writ issued without notice and without bond, restraining the appellant-from voting the 55 shares of stock at any meeting of the corporation for the purpose of voting upon a dissolution thereof, or for any other purpose, until the further order of the court. Motion was filed to dissolve the temporary writ, which motion was denied. The appellant has prosecuted this appeal from the order of the court denying said motion. It is stated by appellant that the only contention is the right of the court to issue

1951, 1952, 1953, 1954, 1955, 1956, 1957, 1958, 1959, 1960, 1961, 1962, 1963, 1964, 1965, 1966, 1967, 1968, 1969, 1970, 1971, 1972, 1973, 1974, 1975, 1976, 1977, 1978, 1979, 1980, 1981, 1982, 1983, 1984, 1985, 1986, 1987, 1988, 1989, 1990, 1991, 1992, 1993, 1994, 1995, 1996, 1997, 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2231, 2232, 2233, 2234, 2235, 2236, 2237, 2238, 2239, 2240, 2241, 2242, 2243, 2244, 2245, 2246, 2247, 2248, 2249, 2250, 2251, 2252, 2253, 2254, 2255, 2256, 2257, 2258, 2259, 2260, 2261, 2262, 2263, 2264, 2265, 2266, 2267, 2268, 2269, 2270, 2271, 2272, 2273, 2274, 2275, 2276, 2277, 2278, 2279, 2280, 2281, 2282, 2283, 2284, 2285, 2286, 2287, 2288, 2289, 2290, 2291, 2292, 2293, 2294, 2295, 2296, 2297, 2298, 2299, 2300, 2301, 2302, 2303, 2304, 2305, 2306, 2307, 2308, 2309, 2310, 2311, 2312, 2313, 2314, 2315, 2316, 2317, 2318, 2319, 2320, 2321, 2322, 2323, 2324, 2325, 2326, 2327, 2328, 2329, 2330, 2331, 2332, 2333, 2334, 2335, 2336, 2337, 2338, 2339, 2340, 2341, 2342, 2343, 2344, 2345, 2346, 2347, 2348, 2349, 2350, 2351, 2352, 2353, 2354, 2355, 2356, 2357, 2358, 2359, 2360, 2361, 2362, 2363, 2364, 2365, 2366, 2367, 2368, 2369, 2370, 2371, 2372, 2373, 2374, 2375, 2376, 2377, 2378, 2379, 2380, 2381, 2382, 2383, 2384, 2385, 2386, 2387, 2388, 2389, 2390, 2391, 2392, 2393, 2394, 2395, 2396, 2397, 2398, 2399, 2400, 2401, 2402, 2403, 2404, 2405, 2406, 2407, 2408, 2409, 2410, 2411, 2412, 2413, 2414, 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2424, 2425, 2426, 2427, 2428, 2429, 2430, 2431, 2432, 2433, 2434, 2435, 2436, 2437, 2438, 2439, 2440, 2441, 2442, 2443, 2444, 2445, 2446, 2447, 2448, 2449, 2450, 2451, 2452, 2453, 2454, 2455, 2456, 2457, 2458, 2459, 2460, 2461, 2462, 2463, 2464, 2465, 2466, 2467, 2468, 2469, 2470, 2471, 2472, 2473, 2474, 2475, 2476, 2477, 2478, 2479, 2480, 2481, 2482, 2483, 2484, 2485, 2486, 2487, 2488, 2489, 2490, 2491, 2492, 2493, 2494, 2495, 2496, 2497, 2498, 2499, 2500, 2501, 2502, 2503, 2504, 2505, 2506, 2507, 2508, 2509, 2510, 2511, 2512, 2513, 2514, 2515, 2516, 2517, 2518, 2519, 2520, 2521, 2522, 2523, 2524, 2525, 2526, 2527, 2528, 2529, 2530, 2531, 2532, 2533, 2534, 2535, 2536, 2537, 2538, 2539, 2540, 2541, 2542, 2543, 2544, 2545, 2546, 2547, 2548, 2549, 2550, 2551, 2552, 2553, 2554, 2555, 2556, 2557, 2558, 2559, 2560, 2561, 2562, 2563, 2564, 2565, 2566, 2567, 2568, 2569, 2570, 2571, 2572, 2573, 2574, 2575, 2576, 2577, 2578, 2579, 2580, 2581, 2582, 2583, 2584, 2585, 2586, 2587, 2588, 2589, 2590, 2591, 2592, 2593, 2594, 2595, 2596, 2597, 2598, 2599, 2600, 2601, 2602, 2603, 2604, 2605, 2606, 2607, 2608, 2609, 2610, 2611, 2612, 2613, 2614, 2615, 2616, 2617, 2618, 2619, 2620, 2621, 2622, 2623, 2624, 2625, 2626, 2627, 2628, 2629, 2630, 2631, 2632, 26

AND OTHERS COMPANY, INC.,
Corporation,
vs.
RIDA RUTHER,
Appellant.

14.571

[illegible]

the injunction without notice and without bond.

It appears that in 1934, appellee corporation together with appellant and her brother, William Kolb, formed a corporation known as the F. J. Kolb Cheese Company; that appellant is the owner of 63 shares of the capital stock of said Kolb Cheese Company, William Kolb, her brother, the owner of 62 shares, and that appellee corporation is the owner of 125 shares; that F. J. Kolb is the father of William Kolb and the appellant; that appellant, William Kolb, F. J. Kolb, and others, had maliciously and intentionally violated their fiduciary capacity as officers and directors of the said corporation, and that they had wrongfully and without authority and without any consideration, issued to appellant a stock certificate for 55 shares of stock therein, which it is alleged is the property of appellee and that appellee is the legal holder and owner thereof and entitled thereto; that the said certificate was so issued contrary to the minutes of the corporation; that appellee has requested the issuance of same to it, which request has been refused; and that the defendants also refuse to cancel the certificate as above issued to appellant for which no consideration was paid. The bill sets up many alleged wrongful and fraudulent acts on the part of the defendants in the conduct of the business of the Kolb Cheese Company. More than fifteen various kinds of relief are prayed for. It is alleged that the defendants who constituted the Board of Directors, had adopted a resolution for the dissolution of the Kolb Cheese Company, and that the appellant would vote the 55 shares of stock, which did not belong to her (but to appellee), for the dissolution of said corporation; and if she be permitted to so vote said shares, that irreparable injury would result to appellee. The complaint was supported by affidavit to the effect that the plaintiff would be unduly prejudiced and suffer

irreparable injury unless the writ issued without notice.

Cases involving the right of a court to issue an injunction without notice and without bond depend upon the facts in the particular case. It is a question that must be determined by the court from the facts appearing in the bill and its accompanying affidavit. It may be stated as a general proposition that the granting or refusal to grant such an injunction, rests in the sound discretion of the trial court, and its action should not be disturbed in the absence of an abuse of such discretion. *City of Kewanee v. Otley*, 204 Ill. 402, 408. It is apparent in this case that the purpose of appellee was to keep the property rights of the parties in status quo until the determination of the merits of the controversy. Where it appears that this is important to the final determination of the cause, an injunction will be employed for that purpose. *Young v. Federal Union Surety Co.* 183 Ill. App. 278; *Swift v. McCormick*, 121 Ill. App. 556; *Skelers v. Meyer*, 246 Ill. App. 18.

We think it sufficiently appears that the rights of appellee might have been unduly prejudiced if notice had been required, and see no good purpose why the court should have required a bond. Under such circumstances, the preliminary injunction was proper and the order of the trial court denying motion to dissolve same for the reasons assigned, is affirmed.

Order affirmed.

reasonable injury under the first section of the act.

Cases involving the right of a court to issue an injunction

without a trial and without finding facts upon the facts in the

particular case. It is a question that must be determined by the

court from the facts as they appear in the case and the circumstances

surrounding it. It may be stated as a general proposition that the court

is not to grant an injunction where there is no good cause

shown for the trial court, and the action is not as a matter of

the absence of an abuse of discretion. Ill. App. 102, 408.

It is also stated in the same case that

the purpose of the act is to give the court the right to issue

an injunction where the facts are such that the right of the court

is not to be interfered with. Ill. App. 102, 408.

Of the case, an injunction will be granted for the purpose

of Ill. App. 102, 408. Ill. App. 102, 408. Ill. App. 102, 408.

Ill. App. 102, 408. Ill. App. 102, 408. Ill. App. 102, 408.

We think it is fairly well settled that the right of

the court to issue an injunction is not to be interfered with

by the fact that the court should have found a good

cause for the trial court, and the action is not as a matter of

the absence of an abuse of discretion. Ill. App. 102, 408.

It is also stated in the same case that

Ill. App. 102, 408. Ill. App. 102, 408. Ill. App. 102, 408.

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court. in and
for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby
certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause.
of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said
Appellate Court. at Ottawa, this _____ day of
_____ in the year of our Lord one thousand nine
hundred and thirty-_____

Clerk of the Appellate Court

62 A

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the sixth day of October, in
the year of our Lord one thousand nine hundred and thirty-six,
within and for the Second District of the State of Illinois:

Present -- the Hon. BLAINE HUFFMAN, Presiding Justice.

Hon. FRANKLIN R. DOVE, Justice.

Hon. FRED G. WOLFE, Justice.

JUSTUS L. JOHNSON, Clerk.

RALPH H. JESPER, Sheriff.

287 I.A. 635²

BE IT REMEMBERED, that afterwards, to-wit: On
NOV 30 1936 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

IN THE APPELLATE COURT OF ILLINOIS,
SECOND DISTRICT
OCTOBER TERM, A. D. 1936.

T. A. RICHEY, for the use of NATIONAL FIRE INSURANCE COMPANY OF HARTFORD, a Corporation,)	
)	
Appellant,)	
)	
vs.	)	APPEAL FROM CIRCUIT COURT
	)	HENDERSON COUNTY.
HARDWARE MUTUAL CASUALTY COMPANY, a Corporation,)	
)	
Appellee.)	

HUFFMAN - P.J.

T. A. Richey lived in the village of Stronghurst in Henderson county. He was engaged in the business of operating a public garage and automobile repair shop, selling automobiles, tractors, and farm implements. He had a contract of insurance relative to the above business, with appellee. Richey owned a feed grinding outfit, consisting of a truck, gasoline engine, and grinder. On January 26, 1932, he was operating this feed grinder on a farm owned by D. N. Cortelyou. He was at that time engaged in grinding feed for hire for Mr. Cortelyou. The gas engine ignited, set fire to the barn in which the grinding was going done, and the barn was destroyed by fire. Mr. Cortelyou had his property insured with appellant company. It paid his loss under its policy, in the sum of \$1474.

IN THE SUPREME COURT OF THE DISTRICT OF COLUMBIA

SECOND EDITION

OCTOBER TERM, A. D. 1920.

T. A. RICHESY, for the use of
FIRE INSURANCE COMPANY OF AMERICA,
Corporation,

Respondent,

vs.

HARDWARE MUTUAL GUARANTY COMPANY,
Corporation,

Appellant.

WILLIAM HENRY HARRIS, Clerk
HONORABLE COURT.

HUNNAN - P. 1.

T. A. Richesy lives in the District of Columbia in

his personal account. He was engaged in the business of operating

public garage and automobile repair shop, located in Washington, D. C., and

had a contract of insurance relating to

the above business, with the Hardware Mutual Guaranty Company, the

contract, consisting of a policy, written policy, and premium, on

January 28, 1920, he was notified that the policy was in effect

and by a. m. corporation. He was at that time engaged in business

for hire for Mr. Corporation. The policy was issued, and the

term in which the policy was being done, and the loss was

covered by the. Mr. Corporation had the policy issued with

company. It paid him loss under the policy, in the sum of

Subrogation contract was made by Mr. Cortelyou to appellant company. Thereafter, appellant brought its suit against Richey to recover the amount previously paid by it. Richey notified appellee company of this suit. It advised him that it had no interest in the claim; that his policy did not cover such a loss as was incurred by Mr. Cortelyou, nor the risks incident to the work in which Richey was engaged at the time of the fire, and advised him that he would have to look after the suit himself. Appellant obtained judgment against Richey for the sum demanded. It was unable to collect anything thereon from him, whereupon appellant instituted this suit as a garnishment action against appellee company to recover the aforesaid judgment obtained by it against Richey.

Appellee in this suit filed its answer denying that it owed Richey anything. The cause was heard by the court. The trial court held there was nothing due Richey under the terms of his contract of insurance with appellee company, and rendered judgment in this action that the garnishee defendant go hence without day and that the plaintiff take nothing by its writ. The appellant prosecutes this appeal from the judgment of the court.

The disposition of this case depends wholly upon the contract involved. The provision thereof with reference to the operations specified therein appear in the paragraph entitled "Operations." This paragraph is as follows:

"All work incidental and necessary to the conduct of the Assured's business of operating Automobile Sales Agency, Public Garage and Automobile Repair Shop, including the operation of any style, type or make of automobile, tractor, or trailer, for all purposes in such business and for pleasure use, and including the liability of the Assured arising by or through any automobile, tractor, or trailer, sold, repaired or overhauled by the Assured, but not the carrying of passengers for a consideration or the renting or hiring of automobiles to others (whether such use involves

the carrying of passengers or the carrying of property), except such transportation or delivery of goods or merchandise for prospective purchasers as is strictly incidental to the demonstrating and sale of automobiles."

We find nothing in the contract to cover the grinding of feed for hire such as Richey was engaged in at the time of the fire. Neither does it appear that such a provision was contemplated or intended thereunder.

The judgment of the trial court is affirmed.

Judgment affirmed.

the carrying of weapons in the carrying
ing of property, except when the person
or delivery of goods or merchandise for
prospective business as a result of
essential to the domestic and sale of
automobiles."

The first finding in the contract is that the carrying of
for hire and as a result of the carrying of the first
together does it appear that such a provision was considered as
attended the matter.

The judgment of the trial court is affirmed.

Reversed and remanded.

STATE OF ILLINOIS, } ss.

SECOND DISTRICT

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and thirty-_____

Clerk of the Appellate Court

63 A

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the sixth day of October, in
the year of our Lord one thousand nine hundred and thirty-six,
within and for the Second District of the State of Illinois:

Present -- the Hon. BLAINE HUFFMAN, Presiding Justice.

Hon. FRANKLIN R. DOVE, Justice.

Hon. FRED G. WOLFE, Justice.

JUSTUS L. JOHNSON, Clerk.

RALPH H. DESPER, Sheriff.

287 I.A. 635³

BE IT REMEMBERED, that afterwards, to-wit: On

NOV 30 1936

the opinion of the Court was filed in the

Clerk's office of said Court, in the words and figures
following, to-wit:

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT
OCTOBER TERM, A.D. 1936.

BERNICE SIMMONS,)	
Appellee,)	
vs.	)	APPEAL FROM CIRCUIT COURT
HARRY E. NICHOLS,	)	KANE COUNTY.
Appellant.)	

HUFFMAN - P.J.

This was an action by appellee against appellant to recover damages for personal injuries sustained by appellee while riding in an automobile with appellant, as his guest. The cause was tried by a jury, which returned a verdict in favor of appellee for the sum of \$5,000. Judgment was entered on the verdict. Appellant appeals therefrom.

Appellant urges that the trial court erred in refusing to grant his motions for a directed verdict; that the court erred in admitting certain evidence for appellee; and that the verdict is against the manifest weight of the evidence.

Appellant was trying out a new automobile with a view to purchasing the same. He invited appellee to accompany him for a ride. Appellee states she admonished the appellant against fast driving before starting on the ride, and that during the progress of the ride she made requests upon him to slow down and to reduce

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

OCTOBER TERM, A.D. 1936.

ERIC SIMONS,
Appellee,
vs.
FRY E. NICHOLS,
Appellant.

STATE COURT,
DAVE COUNTY.

TRIAL - 1.7.

This was an action by appellee against appellant to
cover damages for personal injuries sustained by appellee while
riding in an automobile with appellant, as his guest. The cause
was tried by a jury, which returned a verdict in favor of appellee
for the sum of \$5,000. Judgment was entered on the verdict.
Appellant appeals therefrom.

Appellant urges that the trial court erred in reluc-
tantly granting his motion for a directed verdict; that the court
erred in admitting certain evidence; and that the
verdict is against the manifest weight of the evidence.
Appellant was trying out a new automobile and was
promising the same. He invited appellee to accompany him for
a ride. Appellee states and demonstrates the appellant was not
driving before starting on the ride, and that during the progress
of the ride she made requests for the car to slow down and to

the speed of the car; but that appellant persisted in driving at a high rate of speed in disregard of her protests, and while so operating the car in such reckless manner, he drove it over three dogs which were upon the highway, whereupon he lost control of the car, ran off the road and struck a tree of approximately two feet in circumference, breaking down the tree and seriously injuring appellee.

The accident happened on October 13, 1933, at about three-thirty in the afternoon, on a paved state highway outside the city of Aurora. Appellee states the dogs were first seen from eight hundred to a thousand feet from the car, and that she called appellant's attention to them. Notwithstanding this situation the appellant continued to operate the automobile at such a speed and in such a manner that he ran into and over the dogs thereby losing control of the car and causing appellee's injuries, which caused her confinement in the hospital for ten weeks. She was unconscious for eighteen days and delirious for eight weeks after the accident. Subsequently she was confined to her bed at her home for two months. She was still unable to do her house work at the time of the trial and so permanently impaired as to almost be incapacitated.

We are in accord with the ruling of the trial court in denying appellant's motion for directed verdict at the close of appellee's evidence and again at the close of all the evidence. From a reading of the record we are of the opinion there were sufficient facts to cause the case to be submitted to the jury.

The introduction of evidence complained of by appellant consists of that of a bankruptcy schedule prepared by him and filed in the United States Court for the Northern District of

speed of the car, but that appellant was in a high rate of speed in disregard of her protests, and while operating the car in such reckless manner, he drove it over the dogs which were upon the highway, whereupon he lost control of the car, ran off the road and against a tree or other object, two feet in circumference, striking both the time and seriously injuring appellee.

The accident happened on January 2, 1931, at about three-thirty in the afternoon, on a narrow, gravelly, unimproved city of Aurora. Appellee states the dogs were first seen from eight hundred to a thousand feet from the car, and that she called appellant's attention to them. During this time the appellant continued to operate his automobile at such a speed and in such a manner that he ran into and over the dogs thereby losing control of the car and causing appellee's injuries, which caused her confinement in the hospital for two weeks. She was unconscious for eighteen days and thereafter for eight weeks after the accident. Appellant says she was confined to bed at her home for two months. She was still unable to do any work at the time of the trial and is permanently disabled to almost be incapacitated.

She is in accord with the opinion of the trial court in finding appellant's action to be negligent. Appellant's evidence and that of the other witnesses is in accord with the finding of the court as to the facts in this case. The facts in this case are in accord with the finding of the court as to the facts in this case. The facts in this case are in accord with the finding of the court as to the facts in this case.

Illinois, wherein he scheduled as unsecured creditors the hospital, the nurses, and the doctor who attended appellee, following her injuries. Counsel for appellant objected to the introduction of this schedule, which objection was overruled. Appellee had already introduced evidence showing that appellant had paid these same nurses a part of their charges for attending her. No objection was made to this evidence. Subsequently, counsel for appellant, upon cross examination of Dr. Murphy proved payments by appellant to the doctor and to the nurses for their attendance upon appellee.

Declarations against interest or admissions of the adverse party, are generally admissible against him. Evidence of the conduct of a person after a transaction, is admissible to disprove the position he takes in a litigation involving such transaction. *Ikenberry v. New York Life Ins. Co.* 127 Minn. 215, 189 N.W. 292; *Bernasconi v. Bassi*, 261 Mass. 26, 158 N.E. 341. Evidence of acts by defendant tending to show that he was to blame for an accident, or tending to show an admission of liability, are proper, even though some objectionable features may attend the admission of such evidence, when there is nothing to show prejudice on the part of the jury, and the other evidence in the case amply sustains the verdict. Under such circumstances, the incidental errors should not reverse a judgment. *Robins v. Weed* (Iowa) 169 N.W. 772. Acts or statements by a party following an automobile collision, which tend to prove a consciousness of recognition of liability for the damages incurred, are generally permissible on the theory of an admission. *Marmen v. Haas*, 80 A.L.R. 1151, 241 N.W. 70; *State v. Anderson*, 65 A.L.R. 1307, 227 N.W. 220; *Rentz v. Collins* (Ga.) 181 S.E. 678.

Illinois, wherein he scheduled as unaccounted for at the hospital,

the nurses, and the doctor who attended appellee, following her injuries. Counsel for appellant objected to the introduction of his schedule, which objection was overruled. Appellee had already introduced evidence showing that appellee had paid these same nurses a part of their charges for attending her. No objection was made to this evidence. Consequently, counsel for appellant, upon cross examination of Dr. Murphy, proved competent by expert testimony to the doctor and to the nurses for their attendance upon appellee.

Declarations against interest or admissions of the adverse party, are generally admissible against him. Evidence of the conduct of a person after a transaction, is inadmissible to prove the position he takes in a litigation involving such transaction. *Ikemberry v. New York Life Ins. Co.*, 127 Minn. 210, 150 N.W. 202; *Wernick v. W. W. W. Co.*, 151 Minn. 241, 185 N.W. 241. Evidence of acts by defendant tending to show that he was to blame for an accident, or tending to show an admission of liability, is proper, even though some objectionable features may attend the admission of such evidence, when there is no other evidence in the case to sustain the verdict. Under such circumstances, the accidental errors should not reverse a judgment. *Wicks v. Wicks*.

See (Iowa) 159 N.W. 772. Issue of liability of a party claiming an automobile collision, which could be proved by competent evidence, recognition of liability for the collision occurred, and the party is liable on the theory of an admission. *Wernick v. W. W. W. Co.*, 151 Minn. 241, 185 N.W. 241; *Wernick v. W. W. W. Co.*, 151 Minn. 241, 185 N.W. 241; *Wernick v. W. W. W. Co.*, 151 Minn. 241, 185 N.W. 241.

The introduction of the bankruptcy schedule was admitted in evidence by the trial court upon the theory that it was a circumstance tending to show a recognition of liability on the part of the appellant and proper as an admission. The only probative force of such exhibit was to tend to prove that appellant assumed or recognized liability for the expenses of the doctor, hospital and nurses incident to appellee's care and treatment therein. Evidence to this effect had previously been introduced without objection. It appears that appellant began paying appellee's hospital expenses about a week after her entrance thereto, and that he paid each of the nurses at that time, the sum of \$42. Appellant, upon cross examination of Dr. Murphy proved the amount of the hospital bill to be \$450; the amount of the doctor's bill to be \$775; that there was due one nurse the sum of \$396; and to another nurse the sum of \$390; and that appellant had paid the doctor the sum of \$140 upon his bill and had paid to each of the nurses the sum of \$84.

The admission of incompetent evidence, is not necessarily prejudicial error where there is plenty of other evidence to prove the same fact. The items listed in the schedule relative to the hospital, nurses, and doctor bills, were merely corroborative of the evidence previously introduced by appellee showing the conduct of appellant in the payment of these bills, and of that subsequently introduced by appellant to the same effect. An objection to testimony will not be considered on appeal where the same testimony has been previously received in evidence without objection. *Butler v. National Live Stock Ins. Co.* 200 Ill. App. 280, 288; *Graham v. Mattoon City Ry. Co.* 234 Ill. 483, 489. Due to the fact of appellant's

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acts and conduct in making payment of the bills, being previously introduced in evidence without objection, we are not of the opinion that the introduction of the bankruptcy schedule, tending to prove the same thing, constitutes error. For a further reason, the appellant introduced by the doctor, evidence of the same facts as those reflected by the schedule. Appellant should not be heard to complain of the introduction of evidence by appellee when he subsequently makes proof of the same state of facts. We are of the opinion that the error, if any, in the introduction of the schedule, was lost when the appellant failed to object to the introduction of such proof in the first instance, and afterwards proceeded to make proof of the same facts and conduct. *Gruver v. City of Dixon*, 85 Ill. App. 79, 81.

A record need not be free from all error. If it appears therefrom that a just conclusion has been reached, founded upon competent and sufficient evidence, and that no error has occurred which might have been prejudicial to the appellant's rights, the judgment should be affirmed. *Hodges v. Percival*, 132 Ill. 53; *People v. Schueneman*, 320 Ill. 127; *People v. Hoffee*, 354 Ill. 123; *People v. Nusbaum*, 326 Ill. 518.

The record discloses sufficient other evidence, in addition to the schedule, to justify the finding of the jury. The judgment of the trial court is therefore affirmed.

Judgment affirmed.

acts and conduct in making payment of the bill, being introduced in evidence without objection, we are not of the opinion that the introduction of the handwriting exhibits, tending to prove the same thing, constitutes error. But a further reason, the appellant introduced by the doctor, evidence of the bill, is those reflected by the schedule. Appellate should not be found to complain of the introduction of evidence by exhibits when the appellant makes proof of the same facts of fact. In fact, the opinion that the error, in fact, in the introduction of the schedule, was lost when the appellant failed to object to the introduction of such proof in the first instance, and appellate proceeded to make proof of the same facts and conduct. *Driver v. City of Dixon*, 85 Ill. App. 72, 81.

A record need not be free from all error. It is apparent therefrom that a just conclusion has been reached, based upon competent and sufficient evidence, and that no error has occurred which might have been prejudicial to the appellant. Rights, the judgment should be affirmed. *Woods v. Davis*, 132 Ill. 33; *Wells v. Edwards*, 220 Ill. 107; *People v. Smith*, 354 Ill. 123; *People v. Edwards*, 354 Ill. 325. The record is closed, and no further evidence, in addition to the schedule, is needed and should be rejected. The judgment of the trial court is affirmed.

Reversed.

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I. JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause. of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and thirty-_____

Clerk of the Appellate Court

64 #

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the sixth day of October, in
the year of our Lord one thousand nine hundred and thirty-six,
within and for the Second District of the State of Illinois:

Present -- the Hon. BLAINE HUFFMAN, Presiding Justice.

Hon. FRANKLIN R. DOVE, Justice.

Hon. FRED G. WOLFE, Justice.

JUSTUS L. JOHNSON, Clerk.

RALPH H. DESPER, Sheriff.

287 I.A. 6354

BE IT REMEMBERED, that afterwards, to-wit: On
NOV 30 1936 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

IN THE APPELLATE COURT OF ILLINOIS,

SECOND DISTRICT

OCTOBER TERM, A. D. 1936.

THE PEOPLE OF THE STATE OF ILLINOIS,
ex rel., MICHAEL J. CHARLEY, as
Supervisor, etc.,

Appellee,

vs.

VICTOR J. BEAUMONT, Town Clerk in
and for the Town of LaSalle,

Appellant.

APPEAL FROM CIRCUIT
COURT, LASALLE COUNTY.

HUFFMAN - P.J.

This is a mandamus proceeding brought by appellee as supervisor and ex-officio treasurer of the road and bridge fund of the town of LaSalle, in LaSalle County, against appellant as town clerk of said town, to compel him to countersign a warrant for the payment of the annual premium on appellee's bond as treasurer of the road and bridge fund of said town. Appellee had been supervisor of the town of LaSalle since 1908, except for one two-year term. The petition among other things, sets out that appellee was last elected to said office on April 4, 1933; that at said time, the appellant was reelected as clerk of said town; that appellee qualified and furnished bond in a surety company, which bond was duly approved; that the first year's premium thereon was paid by said town by means of a warrant drawn and countersigned by appellant, as town clerk, signed by the Commissioner of Highways and paid by appellee as treasurer of the road and bridge fund; that the second year's premium is now due and payable; that the claim has been

IN THE SUPREME COURT OF ILLINOIS

SECOND DISTRICT

OCTOBER TERM, A. D. 1938.

THE PEOPLE OF THE STATE OF ILLINOIS,
ex rel., MICHAEL J. CHAMBERLAIN, as
Superintendent,
Appellee,
vs.
VICTOR J. BEAUMONT, Town Clerk in
and for the Town of LaSalle,
Appellant.

HUTCHMAN - P. 1.

This is a mandamus proceeding brought by appellee as superintendent and ex-officio treasurer of the road and bridge fund of the town of LaSalle, in LaSalle County, against appellant as town clerk of said town, to compel him to countermand a warrant for the payment of the annual premium on appellee's bond as treasurer of the road and bridge fund of said town. Appellee had been superintendent of the town of LaSalle since 1908, except for one two-year term. His petition among other things, sets out that appellee was first elected to said office on April 4, 1911; that on said date, the appellant was reelected as clerk of said town; that appellee qualified and furnished bond in a sum of money, which bond was duly approved; that the first year's premium thereon was paid by said town by means of a warrant drawn and countersigned by appellee as town clerk, signed by the commissioners of highways and sold by appellee as treasurer of the road and bridge fund; that one year's premium is now due and payable; that the claim has been

audited and approved by the Board of Town Auditors and ordered paid; that a warrant for the amount (\$450) has been drawn by appellant, as town clerk, signed by the Commissioner of Highways, and upon being returned to appellant, as town clerk, along with other warrants, to be by him countersigned, that he refused to countersign the warrant in question for the payment of said premium; that repeated demands have been made upon him, and that he persists in his refusal to countersign the warrant and deliver same to the Highway Commissioner or to appellee in order that it might be paid; and that the surety company is threatening to cancel the bond. Other pertinent allegations are contained in the petition and amendment thereto. Demurrers were filed to the petition and amended petition, which were overruled. A series of answers and amended answers were filed by appellee to the petition and amendment. Demurrers were sustained to these answers. At the March term, 1936, the last order was entered striking the answer of appellant. Leave was given appellant to file further answer by May 27, 1936. He filed no answer. On June 1, 1936, written notice was given him that appellee would appear before the court on June 5, 1936, at ten o'clock A.M., on a hearing on the petition. The appellant did not appear and order of default was entered against him for want of an answer. The issues were found for the petitioner and order entered for the writ as prayed.

Appellant prosecutes this appeal from the judgment of the court awarding the writ. Appellant argues as grounds for reversal that an adequate remedy at law was available; that this is an effort to collect a civil debt by way of mandamus; and that mandamus will not issue until judgment at law is first had for the amount claimed due.

audited and approved by the Board of Town Auditors and ordered that a warrant for the amount (\$400) has been drawn by appellant, as town clerk, signed by the Commissioner of Highway, and upon being returned to appellant, as town clerk, along with other warrants, to be by him countersigned, that he refused to countersign the warrant in question for the payment of said premium; that repeated demands have been made upon him, and that he persists in his refusal to countersign the warrant and deliver same to the Highway Commissioner or to appellee in order that it might be paid; and that the equity company is threatening to cancel the bond. Other petition of appellants are contained in the petition and amendment thereto. Demurrers were filed to the petition and amended petition, which were overruled. A series of answers and amended answers were filed by appellee to the petition and amendment. Demurrers were sustained to these answers. At the March term, 1936, the last order was entered striking the answer of appellant. Leave was given appellant to file further answer by May 27, 1936. He filed no answer. On June 1, 1936, written notice was given him that appellee would appear before the court on June 5, 1936, at ten o'clock A.M., on a hearing on the petition. The appellant did not appear and order of default was entered against him for want of an answer. The same was taken for the petitioner and order entered for the writ as prayed. Appellant prosecutes this appeal from the judgment of the court awarding the writ. Appellant urges as reasons for reversal that an adequate remedy at law was available; that this is an equity to collect a civil debt by way of damages; and that judgment will not issue until judgment at law is first had for the amount claimed due.

One who submits to a default, upon appeal, will be held to have admitted all that is well alleged against him. *Roe v. County of Cook*, 358 Ill. 568, 570; *Seither & Cherry Co. v. Board of Education*, 283 Ill. App. 392. Under the statute (Sec. 9, Ch. 87), the writ of mandamus will be allowed where it will afford a proper and sufficient remedy, even though the petitioner may have another specific legal remedy. *People v. Kent*, 300 Ill. 324, 333; *People v. Czaszewicz*, 295 Ill. 11, 17; *People v. Sullivan*, 339 Ill. 146, 156; *O. & M. Ry. Co. v. People*, 121 Ill. 483.

In an appeal of this nature from a default judgment, upon review, the appellant is bound by the sufficiency of the cause as stated in the complaint or petition. *Seither & Cherry Co. v. Board of Education*, *Supra*; *Roe v. County of Cook*, *Supra*. Where the claimant by the allegations of the petition has shown a clear right to the payment of a definite amount, which is wrongfully withheld, and a plain duty exists on the part of the defendant to act, the fact that an action in debt or assumpsit might be an available remedy, is not sufficient grounds to defeat a petition for mandamus under circumstances such as exist in this case. *People ex rel Hamilton v. City of Chicago*, 274 Ill. App. 206. The allegations of the petition stand undisputed. This state by statute has liberalized the action of mandamus to the extent that in cases of this character, when the clear right is sufficiently shown, the action will lie as a speedy, convenient and adequate remedy, even though other specific remedies may be available. The reason for this rule is expressed in *People ex rel v. Getzendaner, et al.*, 137 Ill. 234, 262.

We are of the opinion that the trial court properly exercised its discretion in awarding the writ herein. The judgment is therefore affirmed.

JUDGMENT AFFIRMED.

One who submits to a default, upon appeal, will be held to have admitted all that is well alleged against him. Roe v. County of Cook, 358 Ill. 588, 570; Gethner & Cherry Co. v. Board of Education, 388 Ill. App. 393. Under the statute (Sec. 2, Ch. 87), the writ of mandamus will be allowed where it will afford a proper and

sufficient remedy, even though the petitioner may have another specific legal remedy. People v. Hunt, 300 Ill. 324, 338; People v. Gassawetz, 325 Ill. 11, 17; People v. Sullivan, 370 Ill. 146, 152; O. & M. Ry. Co. v. People, 181 Ill. 428.

In an appeal of this nature from a default judgment, upon review, the appellant is bound by the sufficiency of the case as stated in the complaint or petition. Gethner & Cherry Co. v. Board of Education, supra; Roe v. County of Cook, supra. Where the claimant by the allegations of the petition has shown a clear right to the payment of a definite amount, which is wrongfully withheld, and a plain duty exists on the part of the defendant to act, the fact that an action in debt or assumpsit might be an available remedy, is not sufficient grounds to defeat a petition for mandamus under circumstances such as exist in this case. People ex rel Hamilton v. City of Chicago, 274 Ill. App. 306. The allegations of the petition stand undisputed. This state by statute has liberalized the action of mandamus to the extent that in cases of this character, when the clear right is sufficiently shown, the action will lie as a matter of convenience and adequate remedy, even though other specific remedies may be available. The reason for this rule is expressed in People ex rel v. Getzenhamer, et al., 137 Ill. 324, 326.

We are of the opinion that the trial court properly exercised its discretion in awarding the writ herein. The judgment is therefore affirmed.

JUDGMENT AFFIRMED.

STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I. JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and

for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause. of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and thirty-_____

Clerk of the Appellate Court

65 H

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the sixth day of October, in
the year of our Lord one thousand nine hundred and thirty-six,
within and for the Second District of the State of Illinois:

Present -- the Hon. BLAINE HUFFMAN, Presiding Justice.

Hon. FRANKLIN R. DOVE, Justice.

Hon. FRED G. WOLFE, Justice.

JUSTUS L. JOHNSON, Clerk.

RALPH H. DESPER, Sheriff.

287 I.A. 636¹

BE IT REMEMBERED, that afterwards, to-wit: On

NOV 30 1936

the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

October Term, A. D. 1936.

HARRY L. TOPPING,)	
)	
Appellee,)	
)	
vs.	)	APPEAL FROM THE COUNTY COURT
)	
WILLIAM B. WARD,	)	OF KANKAKEE COUNTY.
)	
Appellant.)	

DOVE, J.

Harry L. Topping, Jr. was driving a Plymouth sedan automobile south on State Route No. 25 on the evening of July 5, 1935, accompanied by Mary Limerick, who sat in the front seat at his right, and by Max Stentz and Marjorie Bobbitt, who occupied the rear seat. They left Kankakee about eight thirty in the evening and had proceeded south along Route No. 25 several hundred feet south of the Kankakee airport and were in the act of making a left turn in order to enter an intersecting macadam road running in an easterly and westerly direction when the right front end of William B. Ward's Nash sedan, which was being driven by Mr. Ward along said route in a southerly direction, collided with the left rear end of the Topping car, knocking it across the macadam road and turning it over. This suit was thereafter instituted before a Justice of the Peace by the father of Henry L. Topping, Jr., who owned the car which his son was driving, to recover from Ward the damages he sustained by reason of his car being injured in the collision. Upon an appeal from the judgment rendered by the justice, a trial

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1. The first part of the paper is devoted to the study of the properties of the function $f(x)$ defined by the equation

. J. A. Lie, r. A.

[illegible]

was had in the County Court, a jury being waived, which resulted in a judgment in favor of the plaintiff for \$162.81 and the defendant has prosecuted this further appeal.

The driver of the Topping car testified that as he proceeded south from Kankakee, he was going between twenty and twenty-five miles per hour and that when he came to a point about ten feet north of the north edge of the intersection he slowed his car down to between fifteen and twenty miles per hour, and that he then turned his car to the left and had crossed the black line which marked the center of the concrete pavement and had his car pointed in a southeasterly direction and was entirely in the east traffic lane when the collision occurred. He further testified that he observed in his rear-view mirror the lights of the Ward car approaching from the rear, but had no judgment as to how far north of his car it was when he first observed it. That when he looked in his mirror again, the Topping car was about three hundred feet from the intersection and the Ward car back of him travelling in the west traffic lane, but much closer than when he first observed the lights of the Ward car. That when he, Topping, was about one hundred feet north of the north line of the intersection, he again observed the Ward car in the mirror and noticed it was much closer but estimated that it was then about three hundred feet in his rear. He further testified that just before he made the turn he again looked in the mirror to see where the Ward car was and noticed that it was about fifty feet behind him and that as he turned he heard the "honk" of the Ward car and a second or a couple of seconds later the collision occurred. He further testified that when he was about fifty feet north of the intersection, he put out his left hand for a couple of seconds and kept it out until he started to make the turn. In answer to the question: "Did it occur

was had in the Court House, I have been told, that, resulting in
a judgment in favor of the Plaintiff for \$100.00 and the defendant
was proceeded with without appeal.

The driver of the Fordster was recalled that on the day
needed some time between; he was between between heads and between
five miles per hour and that soon he came to a point where the road
north of the north side of the intersection of the road and the road
to between fifteen and twenty miles per hour, he was in the
turned his car to the left and he was on the road and the road
marked the center of the road, he was on the road and the road
in a southerly direction and was on the road and the road
lane when the collision occurred. He was on the road and the road
observed in his car after the collision that the car was on
approaching from the rear, he had no intention to do so and
of his car was with the driver of the car. He was on the road
in his mirror again, the driver of the car was on the road and
from the intersection and he was on the road and the road
the next traffic lane, he was on the road and the road
the lights of the car. He was on the road and the road
hundred feet north of the point of the collision, he was on
observed the car on the road and the road and the road
but estimated that it was on the road and the road and the road
near. He was on the road and the road and the road and the road
again looked in the mirror and he was on the road and the road
noticed that it was about thirty feet north of the point of
turned he heard the driver of the car and he was on the road
of change made the collision occurred. He was on the road and the road
when he was about fifty feet north of the point of the collision, he was on
his left hand side of the road and he was on the road and the road
started to make the car. He was on the road and the road and the road

to you as you approached the intersection that that car might attempt to pass you as you were going along there?", the witness answered: "If I would have gone further it would have passed me, but I was going to turn right there. I didn't think it would pass me", and at the trial before the justice he added: "I thought I could get to the intersection before".

Mary Limerick testified that when the Topping car, in which she was riding, approached the intersection, Henry Topping, Jr., the driver thereof, told the passengers that he was going to turn to the left and when he was fifty or seventy-five feet north of the north line of the intersection, he took his left hand off the steering wheel and put his hand out the window opening and signalled the turn and then drew his hand in and took hold of the steering wheel with both hands and turned the car so that it faced in a southeasterly direction and the front end of the car had proceeded almost off the pavement when the collision occurred.

Mas Stentz testified that he was sitting on the right side of the rear seat of the Topping car, didn't observe whether the driver put out his hand or not before the turn was made, but felt the car turn, heard a honk and the next thing was the collision.

The plaintiff testified that he went to the scene of the accident shortly thereafter and observed skid marks on the east side of the pavement, starting about sixty-five feet north of the north line of the intersection and ended right at the intersection. He described the location and appearance of the cars as he observed them and testified that a day or so later the defendant told him in a conversation relative to the accident that he was going about fifty-five miles per hour.

The defendant testified in his own behalf that when he first observed the Topping car it was about five hundred feet in front of him and at that time the defendant was driving at the rate

to you as you approached the intersection that that car was
attempt to pass you as you were going into the intersection, the witness
answered: "If I could have seen the car I would have known it was
but I was going to turn right there. I didn't think it could
pass me", and at the trial before the jury he said: "I
thought I could get to the intersection before".
The witness testified that when the copying car, in
which she was riding, approached the intersection, seeing the
car, the driver thereof, at the intersection that he was going to
turn to the left and when he was within of seventy-five feet north
of the north line of the intersection, he took his left hand off
the steering wheel and put his hand on the window opposite and
signaled the turn and then drove the car in and took half of the
steering wheel with both hands and turned the car so that it faced
in a southeasterly direction and the front end of the car was pro-
ceeded almost off the pavement when the collision occurred.
The witness testified that he was sitting on the right
side of the rear seat of the copying car, didn't observe the car
the driver put out his hand or not believe his testimony was, but
felt the car turn, heard a noise and the next moment was in collision.
The plaintiff testified that he was in the driver of the
collision shortly thereafter and observed this car on the east
side of the pavement, starting about seventy-five feet north of the
north line of the intersection and was within sight of the intersection.
He described the location and appearance of the car as he observed
them and testified that a day or so later the defendant told him
a conversation relative to the accident that he was in the car
fifty-five miles per hour.
The defendant testified in his own behalf that when he
first observed the copying car it was about fifty miles per hour
north of him and at that time the defendant was driving at the rate

of fifty-five miles per hour, going south on the west side of the pavement, that there were no other cars in the highway, that the Topping car was proceeding slowly and he, Ward, slowed down five or six miles per hour, sounded his horn when between one hundred and one hundred twenty-five feet from the Topping car, and proceeded south. That he again sounded his horn when he was within sixty-five or seventy feet of the Topping car and while the Topping car was still in the west lane. That he, Ward, then proceeded to the east lane and started to pass, driving at that time about forty-five miles per hour. That when he was within twenty to twenty-five feet from the Topping car, it suddenly turned to the east. That he, Ward, immediately applied the brakes and the front end of his car stopped after the collision about five feet south of the north side of the intersection. This witness further testified that the collision occurred at or very near the north line of the intersection and that from the time he first observed the Topping car he watched it very closely and that no signal was ever given by anyone of the intended turn. He further testified that his statement to the plaintiff after the accident was that he was driving at the rate of fifty-five miles per hour when he first observed the Topping car and at that time the Topping car was about five hundred feet away.

There is no necessity of setting out in full the testimony of Chester Davis, Humphrey Christiansen, Donald Wilkin and Pete Dato, who were passengers in the Ward car and whose testimony we have carefully read. Their evidence substantially corroborates the testimony of appellant.

It further appears from the record that the collision occurred a few minutes before nine o'clock in the evening, that the

of fifty-five miles per hour, which would be the test case of the
payment, that there were no other cars in the highway, and the
topping car was proceeding slowly and in a steady, slow, steady
on six miles per hour, around the bend, and between one hundred
and one hundred twenty-five feet from the leading car, and the
ceded south. That he again turned his head when he was about
sixty-five or seventy feet of the leading car and still the
Topping car was still in the same line. That is, then, then
proceeded to the east lane and started to pass, driving at that
time about forty-five miles per hour. That when he was within
twenty to twenty-five feet from the leading car, it suddenly
turned to the east. That he, and, immediately after the car
and the front end of his car stopped after the collision about
five feet south of the north side of the intersection. This
witness further testified that the collision occurred at a very
near the north side of the intersection and that from the time
he first observed the Topping car it was moving at very slowly and
that no signal was ever given to him of the intended pass.
He further testified that his testimony to the effect that
the accident was that he was driving at the rate of fifty-five
miles per hour when he first observed the Topping car and
that the Topping car was about five hundred feet away.
There is no necessary connection between the testimony
of Chester Davis, highway official, and the testimony of
Davis, the state highway engineer in the state of Texas, and the
have carefully read. Their testimony is substantially the same as the
testimony of Topping.

It is further stated from the records that the collision
occurred at a point about one-half mile from the intersection, and the

pavement was dry, the weather warm, the windows of the Topping car were down, the tail light on the Topping car was not burning, its headlights were, as were the headlights on the Ward car, and there were no other cars or traffic upon Route No. 25 or the intersecting macadam road, which was either fifty or fifty-seven feet in width, according to the testimony. The evidence is conflicting only upon the question whether the driver of the Topping car signalled his intention to turn and the rate of speed at which appellant's car was being driven before and at the time of the collision. Upon both of these questions the weight of the evidence, in our opinion, sustains the contention of appellant. The fact that appellant's car did not travel more than five or six feet after the collision tends to corroborate his contention.

This judgment cannot be sustained unless it affirmatively appears that the driver of appellee's car was in the exercise of due care for its safety and that the proximate cause of the damage to his automobile was the negligence of appellant. At the time of this collision our Statute provided that any person operating a motor vehicle should, at the intersection of public highways, pass to the right of the center of such intersection when turning to the left. The driver of the Topping car testified that he began making the turn to the left ten feet north of the north line of the intersecting Macadam road and had turned into the east traffic lane before he entered the intersection. The collision occurred, according to all the testimony, north of the north line of the intersection. Topping, the driver of appellee's car, testified that appellant's car moved about five or six feet after the collision and the testimony of all the witnesses is that the front end of appellant's car, when it stopped, was either at the north line of the intersection or

[illegible]

not to exceed six feet to the south thereof. Had the driver of appellee's car obeyed the provisions of the Statute as it then provided and remained in the west traffic lane until he had gone beyond the center of the intersection, this accident would not have occurred. Furthermore, according to the testimony of the driver of appellee's car, he commenced to make the turn at a time when he observed the car of appellant approaching rapidly from the rear and when it was only about fifty feet behind him and according to the greater weight of the evidence appellant's car was then in the east traffic lane and the driver of appellee's car must have so observed it.

Counsel for appellee, in commenting upon this testimony of the driver of appellee's car, states that the record does show that he testified that he started to make the turn to the left when appellant's car was about fifty feet in his rear, but counsel insist that "Topping, Jr. either misspoke or the court reporter made an error", because he also testified in response to other questions that appellant's car was from one hundred to one hundred fifty feet back of him when he started to make the turn. Of course this court must be guided by the testimony as it appears in the record.

We recognize that the question whether appellant drove his car at a speed greater than was reasonable and proper, having regard to the traffic and the use of the way, or so as to injure the property of appellee was a question of fact to be determined by the trial court as was also the question whether the driver of appellee's car was in the exercise of due care at and just before the time of the collision, and we therefore hesitate to set aside the judgment entered upon the findings of the trial court. Our duty, however, under the law is plain, and being of the opinion that the

not to exceed six feet to the south thereof. And the driver of
Appellants' car obeyed the provisions of the statute as to the
provided and remained in the west traffic lane until he had
beyond the center of the intersection, with Appellants' car
have occurred. Furthermore, a collision in the east traffic
driver of Appellants' car, he continued to drive the car as a
when he observed the car of Appellants' car moving rapidly
his rear and when it was only about fifty feet behind him and
according to the greater weight of the evidence Appellants' car
was then in the east traffic lane and the driver of Appellants'
car must have observed it.

Counsel for Appellants, in examining their witness
the driver of Appellants' car, stated that the reason he
that he testified that he started to make the turn to the left when
Appellants' car was about fifty feet in his rear, but counsel in-
that that "Toppling, Jr. either misstated or the court is in error
n error", because he also testified in response to other questions
that Appellants' car was from one hundred to one hundred fifty
set back of him when he started to make the turn. The court is
court must be guided by the testimony which is the most
We recognize that the testimony of the driver of Appellants' car
is a car at a speed greater than was Appellants' car and that
regard to the traffic and the fact of the way, we are of the
the property of Appellants was a question of fact to be determined
the trial court is also the question whether the driver of
Appellants' car was in the east traffic lane at the time of the
the time of the collision, and whether it was necessary to make
the judgment entered upon the finding of the trial court. The
however, under the law as stated, and under the facts as stated,

judgment of the trial court is against the manifest weight of the evidence, that judgment must be reversed and the cause remanded.

REVERSED AND REMANDED.

...of the trial court is correct and the ...
...that the ...

... ..

STATE OF ILLINOIS, }
SECOND DISTRICT }ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

Clerk of the Appellate Court

66 H 9098

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the sixth day of October, in
the year of our Lord one thousand nine hundred and thirty-six,
within and for the Second District of the State of Illinois:

Present -- the Hon. BLAINE HUFFMAN, Presiding Justice.

Hon. FRANKLIN R. DOVE, Justice.

Hon. FRED G. WOLFE, Justice.

JUSTUS L. JOHNSON, Clerk.

RALPH H. DESPER, Sheriff.

287 I.A. 636²

BE IT REMEMBERED, that afterwards, to-wit: On

NOV 30 1936 the opinion of the Court was filed in the

Clerk's office of said Court, in the words and figures
following, to-wit:

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

October Term, A. D. 1936.

LORETTA M. PENDERGAST,)	
)	
Appellee,)	
)	
vs.	)	APPEAL FROM THE CIRCUIT
)	
JOSEPH C. FOSTER,	)	COURT OF WINNEBAGO COUNTY.
)	
Appellant.))	

DOVE, J.

From a judgment rendered on the verdict of a jury in favor of the plaintiff for \$1248.00, the defendant appeals. The issues submitted to the jury were whether the defendant was driving his automobile carelessly and negligently and at a rate of speed greater than was reasonable and proper having regard for the traffic and use of the way at or near the intersection of West Jefferson and North Court Streets in Rockford on the evening of December 31, 1934, and whether, at that time and place, the plaintiff was in the exercise of due care for her own safety.

The evidence discloses that West Jefferson Street is a through street running east and west. It has a Macadam surface and is fifty-five feet in width between curbs. Court Street runs north and south, and is forty feet wide between curbs. Church Street runs parallel with Court Street and is a block east of Court Street. At the northwest corner of Church and West Jefferson Streets there is an oil

October 1, 1958.

7. EVOG

From a judgment rendered on the verdict of a jury in 1917, the plaintiff for \$1248.00, the defendant appealed. The case was submitted to the jury where the defendant was driving a motor vehicle carelessly and negligently and at a rate of speed greater than was reasonable and proper having regard for the traffic and use of the way at or near the intersection of a highway and a Court Street in Rockford on the evening of December 21, 1904, and whether, at that time and place, the plaintiff was in the custody of the care for her own safety.

The evidence disclosed that East Jefferson Street is a through street running east and west. It has a median surface and is fifty feet in width between curbs. Court Street runs north and south and is forty feet wide between curbs. The highway runs parallel with Court Street and is a block east of Court Street. At the northwest corner of Church and East Jefferson streets there is an old

station and on the northeast corner of the intersection of West Jefferson and Court Streets there is also an oil station, and between these oil stations on the north side of West Jefferson Street there are residences. A church stands on the northwest corner of West Jefferson and Court Streets and residences are on the remaining two corners, and on the south side of West Jefferson Street, east and west of the Court Street intersection, are residences.

Upon the evening in question, appellee, who lived on Court Street north of the West Jefferson Street intersection and was employed as a stenographer and bookkeeper at the Rockford Motor Hotel, accompanied by her aunt, Sarah Glynn, and a friend, Margaret Mani, was walking in a northerly direction on the sidewalk on the west side of Court Street, approaching this intersection en route to her home and as she started to enter the intersection, she testified that her right arm was interlocked into her aunt's left arm and she was walking a trifle ahead of her. That she stopped, looked west, then looked east, but saw no one coming from either direction. That she then started across the street, her arms were then disengaged and she was walking a trifle ahead of both her companions. That when she arrived at the center of the street, she again looked east, saw nothing, and continued northward. When she arrived within eight or ten feet from the curbing on the north side of West Jefferson Street, she observed the lights of appellant's car shining on the pavement in front of her and she thereupon again looked east and at that time appellant's car, according to her testimony, was within ten feet of her. She heard no horn or noises, saw no other cars and recalls nothing else that happened. The other evidence, however, is that some part of the rear portion of appellant's car knocked her down and she was rendered unconscious and shortly thereafter taken to the hospital.

station and on the northeast corner of the intersection of West
Jefferson and Court streets is also an old station, and
between these old stations on the north side of West Jefferson
Street there are residences. A church stands on the northeast corner
of West Jefferson and Court streets and residences are on the west
maining two corners, and on the south side of West Jefferson Street,
east and west of the Court Street intersection, are residences.
Upon the evening in question, according to the living in Court
Street north of the West Jefferson Street intersection and was
employed as a stenographer and bookkeeper at the Woodmont Hotel,
Hotel, accompanied by her aunt, Sarah Quinn, and a friend, Margaret
Hart, was walking in a northerly direction on the sidewalk on the
west side of Court Street, approaching this intersection on going to
her home and as she started to make the intersection, she testified
that her right arm was interlocked into her aunt's left arm and she
was walking a trifle ahead of her. That she stopped, looked west,
then looked east, but saw no one coming from either direction. That
she then started across the street, her arm was then disengaged and
she was walking a trifle ahead of both her companions. That when she
arrived at the center of the street, she again looked west, saw
nothing, and continued northward. When she arrived within eight or
ten feet from the curb on the north side of West Jefferson Street,
she observed the lights of a vehicle approaching on the highway in
front of her and she thereupon again looked east and at that time
appellant's car, according to her testimony, was within ten feet of
her. She heard no horn or bell, saw no other cars and recalled
nothing else that happened. The other evidence, however, is that
some part of the rear portion of appellant's car crossed her own and
she was rendered unconscious and bodily protection was given to her
hospital.

Margaret Mani testified that she was six or ten feet behind appellee and Mrs. Glynn as they approached the intersection. That when this witness stepped off the curb on the south side of West Jefferson Street and entered the pedestrian travelled portion of the intersection, appellee and Mrs. Glynn were in the middle of Jefferson Street. That when she, Miss Mani, arrived at the middle of that street, she looked east and saw appellant's car coming from the east "back of the oil station" on the north side of the center of Jefferson Street, that she, Miss Mani, then ran back to the southwest corner of the intersection and when she arrived there she heard a thud, turned around and saw appellee and Mrs. Glynn lying in the street. She was unable to state how fast the automobile was travelling when she observed it, but her answer that when she first saw appellant's car it was coming "awful fast" was permitted, over appellant's motion to strike the same, to stand. She further testified that she did not hear any horn or warning of the approach of appellant's car. A portion of the additional answer of appellant, which admitted that at the time and place in question and while appellant was driving his automobile westerly on West Jefferson Street, he saw three persons, then unknown to him, step into West Jefferson Street at the point where the west sidewalk line of Court-Street crosses West Jefferson Street, was read into the record. Mrs. Glynn did not testify in chief and the foregoing, together with the testimony of Dr. Goembel, who attended appellee after her arrival at the hospital, constituted the case for appellee.

Appellant testified that he was twenty-four years of age and on the night in question was driving his car west on West Jefferson Street toward the intersection of Court Street and that as he ap-

The first time appellant testified that she was at her home, called
appellant and Mrs. Glynn as they approached the intersection. That
when this witness stepped off the curb on the north side of West
Jefferson Street and entered the intersection, appellant was at
the intersection, appellant and Mrs. Glynn were in the middle of
Jefferson Street. That when she, the witness, arrived at the middle
of that street, she looked east and saw appellant's car coming
from the east "back of the old station" on the west side of the
center of Jefferson Street, that she, the witness, took a right hand
turn at the southwest corner of the intersection and when she arrived there
she heard a loud, turned around and saw appellant's car. When
lying in the street. She was unable to state how far the witness-
dile was travelling when she observed it, but her answer that day
she first saw appellant's car it was coming from the south
permitted, over appellant's objection to bring her back to stand.
The further testimony that she did not have any more or further up
the approach of appellant's car. A portion of the testimony
answer of appellant, which admitted part of the facts and placed in
question and while appellant was driving in the northbound lane,
on West Jefferson Street, he saw three vehicles, two unknown to him,
step into West Jefferson Street at the same time the witness was
line of Court Street crosses West Jefferson Street, and that when
the record. Mrs. Glynn did not testify in what and for investigation
together with the testimony of Mr. Gorman, who attended appellant
after her arrival at the hospital, appellant testified she knew the witness.
Appellant testified that on the third-day night of the year
on the right in question was standing in front of West Jefferson
street toward the intersection of Court Street, no fact of the

proached the intersection he was travelling fifteen miles per hour and about twelve feet south of the north curb line of West Jefferson Street. That he observed three women standing in the middle of Jefferson Street where the west sidewalk line of Court Street would be if it extended across West Jefferson Street, and that when he saw them he took his foot off of the accelerator and his car slowed down. That at this time his car was east a little, or just about even with the east sidewalk line of Court Street. That two of the women started to walk north from the center of the street on the sidewalk line travelling north, and when they reached a point in the street about ten feet from the north curb, the third lady was standing in the center of the street and there was space between her and the other two women for his car to pass. That he intended to do this but suddenly the two women started to go back to the center of the street and when they did this, he swung his car to the right, put on his brakes and the car went up over the curb. That the front of his car went past the two women on their right, but they were struck by some part of the rear portion of his car, but no part of his car, which was approximately ten or twelve feet long passed over appellee's body. That his lights were burning, his brakes were in good condition and that when the car came to a stop its right front wheel was on the Jefferson Street curb on the northwest corner, and appellee's body was lying about ten feet from the back of his car, and that her aunt was lying next to her.

Clell Burkey, who was with appellant in his car on the evening in question, corroborated appellant and testified that when appellee and her aunt were about ten feet from the north curb of Jefferson Street, he observed that they had their arms locked together, that

proceeded the intersection to the south side of the street and about twelve feet south of the south curb line of Jefferson Street. That he observed three women standing in the middle of Jefferson Street where the east sidewalk line of street would be if it extended across East Jefferson Street, and that when he saw them he took his foot off of the accelerator and his car slowed down. That at this time his car was east a little, or just about even with the east sidewalk line of Grant Street. That two of the women started to walk north from the center of the street on the sidewalk line travel north, and when they reached a point in the street about ten feet from the north curb, the third lady was standing in the center of the street and there was a space between her and the other two women for his car to pass. That he intended to do this but suddenly the two women started to go back to the center of the street and when they did this, he swung his car to the right, and on his brakes and the car went up over the curb. That the front of his car went past the two women on their right, but they were struck by some part of the rear portion of his car, but no part of his car, which was approximately ten or twelve feet long, passed over any part of his body. That his lights were burning, his brakes were in good condition and that when the car came to a stop it struck Grant Street on the Jefferson Street curb on the west side corner, and that his body was lying about ten feet from the back of his car, and that his aunt was lying next to him.

Cliff Burke, who was sitting next to him in the car at the time in question, corroborated applicant and testified that when applicant and her aunt were about ten feet from the north curb of Jefferson Street, he observed that they had their feet locked together, and

they appeared to be excited and they started back south and were see-sawing back and forth and were jerking at each other. That when they started back south, appellant turned his car to the north and applied the brakes and that when the car stopped, the rear end of it was six or eight feet from the bodies of appellee and her aunt. The evidence is further that Court Street is forty feet in width between curbs and that West Jefferson Street is fifty feet wide from curb to curb and is a through street and signs so advising pedestrians and vehicular traffic appeared on each side of Court Street. That as you looked each way from the intersection, the view was unobstructed both east and west for several blocks. Mr. Burkey further testified that there were no cars parked along the north curb of Jefferson Street near the intersection and that as appellant's car approached the intersection, it was travelling about eight feet south of the north curb line of Jefferson Street.

According to the testimony of the plaintiff, no cars were in West Jefferson Street as she entered and started to cross the intersection, either approaching from the west or the east. That she first became cognizant of the presence of appellant's car from the shining of its lights on the pavement in front of her, when she was within eight or ten feet of the curbing on the north side of Jefferson Street. That when she stopped in the center of the street, she looked but did not see appellant's car. When Miss Mani first observed appellant's car it was back by the oil station. Miss Mani then turned around and went back to the curb and in doing so she travelled twenty-five feet. So while Miss Mani travelled twenty-five feet, appellant's car travelled the distance from where she observed it back of the oil station to the point of collision. Just how far back of the intersection appellant's car was does not

appear. The negligence charged was that appellant operated his automobile at a speed that was greater than was reasonable and proper, having regard for the traffic and the use of the way. Other than the conclusion of Margaret Mani, that appellant's car was approaching "awful fast", there is no evidence to sustain this charge. The testimony of appellant and Mr. Burkey, the other occupant of the car, is that appellant was approaching this intersection at a rate of speed not to exceed fifteen miles per hour, and the physical fact that the car did stop within eight or ten feet after it had struck appellee tends to corroborate the testimony of appellant.

Appellant and the occupant of his car testified that appellee and her aunt, after coming within eight or ten feet of the north curb of West Jefferson Street, hesitated and started back south. Appellee and her aunt, in rebuttal, denied this and testified that they proceeded without stopping and without interruption from the time they left the center of the street until they were hit. In this connection it might be well to recall appellee's testimony in chief, in which she stated that when she arrived within eight or ten feet of the north curb she looked east, saw appellant's car within ten feet of her and recalls nothing further that happened. Furthermore, appellee testified that when she was in the middle of the street she looked but did not see appellant's car. There was no reason why she could not have seen it. It was there and her companion Margaret Mani saw it and escaped injury. Appellee therefore is in the same position as one who did not look because had she looked, she must have observed what necessarily must have been observable.

appear. The negligence charged was that appellant operated his automobile at a speed that was greater than the reasonable and proper, having regard for the traffic and the use of the way. Other than the conclusion of the jury that the automobile was approaching "with great speed", there is no evidence to sustain this charge. The testimony of appellant and Mr. Barker, the driver-occupant of the car, is that appellant was approaching the intersection at a rate of speed not as much as fifteen miles per hour, and the physical fact that the car did not strike the feet of appellant after it had struck appellant's car. The testimony of appellant and the occupant of the car is that appellant was approaching the intersection at a rate of speed not as much as fifteen miles per hour, and the physical fact that the car did not strike the feet of appellant after it had struck appellant's car. The testimony of appellant and the occupant of the car is that appellant was approaching the intersection at a rate of speed not as much as fifteen miles per hour, and the physical fact that the car did not strike the feet of appellant after it had struck appellant's car.

Appellant and the occupant of the car testified that appellant and his aunt, after coming within sight of the feet of the car, turned of West Jefferson Street, testified that appellant and his aunt proceeded without stopping and without interrupting their time they left the center of the street until they were in this connection it is well to recall that the car's testimony in chief, in which she stated that when she first saw the feet of the car, she looked west, and appellant's testimony within ten feet of her and recalled that she saw the feet of the car. Furthermore, appellant testified that when she saw the feet of the car she looked but did not see appellant's car. There was no reason why she could not have seen it. It was dark and her companion Margaret Kent was in the same position as she and did not look back. Appellant testified that when she saw the feet of the car she looked, she must have observed that appellant's car was in the same position as she and did not look back. Appellant testified that when she saw the feet of the car she looked, she must have observed that appellant's car was in the same position as she and did not look back.

This judgment can not be sustained unless it affirmatively appears that appellee was in the exercise of due care at and just before she was injured, and further that the proximate cause of her injuries was the negligence of appellant. We recognize that these are questions of fact and we hesitate to set aside a judgment entered upon the findings of a jury which found both of these issues in favor of appellee. Our duty, however, under the law is plain and being of the opinion that this judgment is against the manifest weight of the evidence, it must be reversed and the cause remanded.

REVERSED AND REMANDED.

This judgment can not be sustained unless it affirmatively
appears that appellee was in the position of one who was last
before she was injured, and that the proximate cause of
her injuries was the negligence of appellant. The record does not
show these are questions of fact and we therefore do not enter a judgment
entered upon the findings. A jury which found both of these
issues in favor of appellee. On any, however, which she was in
plain and being of the opinion that this judgment is a plain
manifest weight of the evidence, it must be reversed and the cause
remanded.

REVEREND AND HONORABLE

STATE OF ILLINOIS, }
SECOND DISTRICT }ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court. in and
for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby
certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause,
of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said
Appellate Court, at Ottawa, this_____day of
_____in the year of our Lord one thousand nine
hundred and thirty-_____

Clerk of the Appellate Court

9130

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AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the sixth day of October, in
the year of our Lord one thousand nine hundred and thirty-six,
within and for the Second District of the State of Illinois:

Present -- the Hon. BLAINE HUFFMAN, Presiding Justice.

Hon. FRANKLIN R. DOVE, Justice.

Hon. FRED G. WOLFE, Justice.

JUSTUS L. JOHNSON, Clerk.

RALPH H. RESPER, Sheriff.

287 I.A. 636³

BE IT REMEMBERED, that afterwards, to-wit: On
NOV 30 1936 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

October Term, A. D. 1936.

MARGARET BODINE,)	
)	
Appellant,)	
)	
vs.	)	APPEAL FROM THE CIRCUIT
)	
HARRY W. LLOYD,	)	COURT OF STARK COUNTY.
)	
Appellee.)	

DOVE, J.

On August 9, 1934, Margaret Bodine, Administratrix of the estate of Joseph C. Bodine, deceased, filed her complaint against Harry W. Lloyd in the Circuit Court of Stark County to recover damages for the alleged wrongful death of the said Joseph C. Bodine. The complaint began, "The plaintiff Margaret Bodine, administratrix of the estate of Joseph C. Bodine, deceased, complains of the defendant Harry W. Lloyd and says." It then alleged that during his lifetime, plaintiff's intestate and the defendant were both residents of this state, that on January 31, 1934, plaintiff's intestate was riding as a guest passenger in defendant's automobile, that defendant was driving the same on U. S. Route No. 36 near Lentner, in Shelby County, Missouri, that by reason of the careless and negligent manner in which the defendant drove said automobile, it was overturned and as a result thereof, plaintiff's intestate was fatally injured and then and there and within one year prior to the commencement of this suit died. The complaint set forth in haec verba a section of the Revised Statutes of Missouri, having to do

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

October Term, A. D. 1936.

MARGARET BODINE,)	
Appellant,)	
vs.)	
HARRY W. LLOYD,)	
Appellee.)	

APPEAL FROM THE CIRCUIT
COURT OF STARK COUNTY.

DOVE, J.

On August 2, 1934, Margaret Bodine, Administratrix of the estate of Joseph C. Bodine, deceased, filed her complaint against

Harry W. Lloyd in the Circuit Court of Stark County to recover damages for the alleged wrongful death of the said Joseph C. Bodine.

The complaint began, "The plaintiff Margaret Bodine, administratrix of the estate of Joseph C. Bodine, deceased, complains of the

defendant Harry W. Lloyd and says." It then alleged that during

his lifetime, plaintiff's intestate and the defendant were both residents of this state, that on January 31, 1934, plaintiff's in-

testate was riding as a guest passenger in defendant's automobile,

that defendant was driving the same on U. S. Route No. 25 near

Lentner, in Shelby County, Missouri, that by reason of the careless

and negligent manner in which the defendant drove said automobile,

it was overturned and as a result thereof, plaintiff's intestate was

fatally injured and then and there and within one year after the

commencement of this suit died. The complaint set forth in detail

verbo a recited of the Revised Statutes of Missouri, Chapter 100

with the operation of motor vehicles in that state and averred a breach thereof and alleged that the rights and liabilities of the parties, plaintiff and defendant, are governed and controlled by the laws of the State of Missouri. The complaint then alleged that plaintiff's intestate left him surviving Margaret Bodine, his widow, but no minor children, and avers that said Margaret Bodine has, by the death of said intestate, suffered pecuniary loss and damage and under the laws and statutes of the State of Missouri is entitled to bring this action and have the sole benefit of whatever may be recovered, and tenders her Letters of Administration issued by the County Court of Stark County, Illinois, as evidence of her right to sue. On October 15, 1934, the defendant filed his answer to the complaint in which, among other things, he averred that the plaintiff, under the law of Missouri, had no right to bring or maintain this action. On August 26, 1935, the original complaint was amended by leave of court by striking out the words "Administratrix of the estate" in the title of said cause and in the commencement of said complaint and substituting in lieu thereof the words "surviving widow" and by striking out that portion of the complaint which referred to the granting of letters of administration to Margaret Bodine and the tender of those letters as evidence of her right to sue. As amended the complaint also alleged that the defendant is a resident of Stark County, Illinois, has no property in Missouri, that service of process cannot be had upon him in that state and under the laws of that state, no substituted service is provided for a non-resident defendant and concludes that therefore the plaintiff cannot maintain her action there. Thereafter and on May 16, 1936, the amended complaint was dismissed on motion of the defendant and the plaintiff, electing to abide by her complaint as amended, judgment

plaintiff, electing to abide by her complaint as amended, judgment was dismissed on motion of the defendant and the defendant's motion there. Thereafter and on May 10, 1935, the defendant defendant and concludes that therefore the plaintiff cannot laws of that state, no substituted service is provided for a non-service of process cannot be had upon him in that state and under the resident of Stark County, Illinois, has no property in Missouri, that As amended the complaint also alleged that the defendant is a Bodine and the tender of those letters as evidence of her right to referred to the granting of letters of administration to Margaret "widow" and by striking out that portion of the complaint which said complaint and substituting in lieu thereof the words "surviving of the estate" in the title of said cause and in the commencement of amended by leave of court by striking out the words "Administratrix maintain this action. On August 26, 1935, the original complaint was plaintiff, under the law of Missouri, had no right to bring or complaint in which, among other things, he averred that the same. On October 12, 1934, the defendant filed his answer to the County Court of Stark County, Illinois, as evidence of her right to recovered, and tenders her letters of Administration issued by the bringing this action and have the sole benefit of whatever may be under the laws and statutes of the State of Missouri is entitled to the death of said intestate, suffered pecuniary loss and damage, but no minor children, and avers that said Margaret Bodine has, by plaintiff's intestate left him surviving Margaret Bodine, his widow, parties, plaintiff and defendant, are governed and controlled by breach thereof and alleged that the rights and liabilities of the with the operation of motor vehicles in that state and averred a

was rendered in favor of the defendant and against the plaintiff in bar of the action and for costs. It is from this judgment that an appeal has been prosecuted to this court.

The statutes of Missouri effective at the time Joseph C. Bodine died authorized Margaret C. Bodine, his surviving widow, to sue for and recover damages for his wrongful death at any time within one year after his death. In the event the deceased left a minor child or children, then such an action might have been brought after the expiration of one year by the administrator of the deceased. (Secs. 4217-8 and 5426 Rev. Stat. of Missouri, 1919.) The complaint as amended averred that Joseph C. Bodine died on January 31, 1934, as a result of an accident which occurred in Missouri, and that he left no minor child or children him surviving. Therefore, under the law of the state where the death occurred, a right of action accrued to Margaret C. Bodine, surviving widow of the deceased and the time fixed during which such an action could be brought was, in the language of the decisions, a condition of liability and operated as a limitation of liability itself. The original action was instituted by Margaret Bodine, administratrix of the estate of Joseph C. Bodine, deceased, on August 9, 1934, but under the Missouri law, no cause of action accrued to the administratrix and therefore the original complaint stated no cause of action. Under the allegations of the amended complaint the surviving widow's cause of action accrued on January 31, 1934, and expired one year later. Almost seven months thereafter, to be exact on August 26, 1935, the amendment to the complaint was filed and for the first time stated a cause of action. This was too late as the action was barred and appellee's conditional

rendered in favor of the defendant and against the plaintiff in
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liability had terminated. Day v. Talcott, 361 Ill. 437: Smith v. Ill. Power Co., 279 Ill. App. 505: Kesslick v. Williams Oil-O-Matic Heating Corp., 277 Ill. App. 263: Friend v. Alton Railroad Co., 283 Ill. App. 366. See also Ill. Law Review, Vol. 31, No. 3, Nov. 1936 issue. Carlin v. Peerless Gas Light Co., 283 Ill. 142: Bishop v. Chicago Ry. Co., 303 Ill. 273.

Counsel for appellant recognize the force of the foregoing authorities, and concede that the Missouri courts have likewise construed its statutes, but insist that the original complaint stated a good cause of action by Margaret Bodine under the Missouri statute, that the amendment of August 26, 1935, did not state a new cause of action, nor did it substitute Margaret Bodine, as widow, for Margaret Bodine, administratrix of the estate of Joseph C. Bodine, deceased, but simply struck from the allegations of the original complaint the terminology, which counsel insist has been held to be mere surplusage and in this connection call our attention particularly to Barnes v. Northern Trust Co., 169 Ill. 112: Higgins v. Halligan, 46 Ill. 173. In Higgins v. Halligan, supra, we note that the court uses this language referring to the declaration in that case in which the plaintiff was referred to as executrix; "describing herself as executrix, if the count was not on a liability to her as such, is mere surplusage." In Barnes v. Northern Trust Co., supra, the court defines surplusage as comprehending whatever may be stricken from the record without destroying the right of action, or the charge on the one hand, or the defense on the other. In the instant case if the plaintiff in the original complaint was Margaret Bodine, administratrix of Joseph C. Bodine and by the amendment she, as surviving widow of Joseph C. Bodine, was substituted as plaintiff, appellee's defenses that no cause of action ever accrued to the administratrix and that the cause of action to the widow had expired by limitation were both destroyed.

Chicago Ry. Co., 303 Ill. 273.
 36 issue. Carlin V. Peetle Gas Light Co., 283 Ill. 142; Bishop
 3 Ill. App. 366. See also Ill. Law Review, Vol. 31, No. 2, Nov.
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troved.

Counsel for appellant further argue that the original complaint nowhere states that the action is brought by the plaintiff in her representative capacity and call our attention to that portion of the original complaint which avers that the deceased left him surviving Margaret Bodine, his widow, but no minor children, and that said Margaret Bodine has, by the death of said intestate, suffered pecuniary loss and damage under the laws and statutes of the state of Missouri and is entitled to bring this action and have the sole benefit of whatever may be recovered in this suit. The complaint, however, must be construed as a whole and in the same paragraph where the foregoing appears and as a part of the same sentence the pleader continues: and the plaintiff brings herewith her letters of administration granted to her by the County Court of Stark County in the State of Illinois, as evidence of her right to sue." Furthermore, the original complaint is captioned or entitled: "Margaret Bodine, Administratrix of the estate of Joseph C. Bodine, deceased, plaintiff". The first paragraph of the original complaint begins: "The plaintiff, Margaret Bodine, administratrix of the estate of Joseph C. Bodine, deceased, complains of the defendant Harry W. Lloyd and says". Numerous references are also made in the original complaint to plaintiff's intestate, and it is clear to us that the plaintiff therein was the administratrix of Joseph C. Bodine and not his widow and was so intended by the pleader. She was suing as administratrix and the complaint was based upon an alleged liability to her as such, and while Margaret Bodine was both the widow and administratrix, her legal entity as administratrix is distinguishable from her legal entity as surviving widow.

Counsel for appellant further argue that the statute of the state of Missouri made no provision for a cause of action to be brought by an administratrix where it appeared that there were no minor children, that the amendment struck certain surplus phraseology

Counsel for appellant further argues that the original complaint

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Garet Bodine has, by the death of said intestate, suffered pecuniary

and damage under the laws and statutes of the state of Missouri

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there may be recovered in this suit. The complaint, however, was

constituted as a whole and in the same paragraph sets the foregoing

and as a part of the same sentence the pleader continues:

the plaintiff brings herewith her letters of administration

ated to her by the County Court of Stark County in the State of

Missouri, as evidence of her right to sue." Furthermore, the original

complaint is captioned as entitled: "Margaret Bodine, Administratrix

the estate of Joseph C. Bodine, deceased, plaintiff". The first

paragraph of the original complaint reads: "The plaintiff, Margaret

ne, administratrix of the estate of Joseph C. Bodine, deceased,

claim of the defendant Harry W. Lloyd and says". Numerous refer-

ences are also made in the original complaint to plaintiff's intestate,

it is clear to us that the plaintiff therein was the administratrix

of Joseph C. Bodine and not his widow and was so intended by the

pleader. She was suing as administratrix and the complaint was captioned

as an alleged liability to her as such, and still Margaret Bodine

both the widow and administratrix, her legal capacity as administratrix

is distinguishable from her legal capacity as surviving widow.

Counsel for appellant further argues that the estate of the

of Missouri made no provision for a claim in action to be

right by an administratrix where it is alleged that there were

children, that the amendment struck certain words from the

was made only for the purpose of clarifying the statement of the original cause of action and that nothing material was added by the additional paragraph which averred that appellant could not maintain an action in Missouri because at the time the amendment was made, appellee was a resident of Stark County, Illinois, has no property in the State of Missouri, that no personal service could be had upon him there and under the laws of that state no substituted service is provided for a non-resident defendant.

The cause of action which appellant sought to avail herself of was created by the Statute of Missouri and not the Injuries Act of the State of Illinois. Under our decisions prior to 1903, our courts refused to take jurisdiction of a cause of action which sought to recover damages for a death by wrongful act, which occurred outside this state, except in those cases where comity had enabled our courts to entertain such suits. *Wall v. Chesapeake and Ohio R. R.*, 290 Ill. 227. The legislature amended our Injuries Act in 1903 and deprived our courts of assuming jurisdiction in any case where a death arose outside Illinois. *Dougherty v. American McKenna Process Co.*, 255 Ill. 369. Our Injuries Act was further amended in 1935 by this amendment which became effective July 1 of that year it provided: "no action shall be brought or prosecuted in this state to recover damages for a death occurring outside of this state where a right of action for such death exists under the laws of the place where such death occurred and service of process in such suit may be had upon defendant in such place." It was by virtue of this amendment that appellant sought to enforce her cause of action which arose by virtue of the provisions of the Missouri Statute in the courts of this state. Under the provisions of the Missouri Statute, assuming that the original complaint stated a cause of action

was made only for the purpose of clarifying the statement of the
final cause of action and that nothing material was added by the
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Missouri was a resident of Stark County, Illinois, and no property
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this state to entertain such suits. Wall v. Chesapeake and Ohio R. Co.,
230 Ill. 327. The legislature amended our Injuries Act in 1900
to give our courts of law jurisdiction in any case where
a cause of action arose outside Illinois. Bonaparte v. American Rockwell Process
Co., 232 Ill. 369. Our Injuries Act was further amended in 1907
by this amendment which became effective July 1 of that year. It
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state to recover damages for a death occurring outside of this
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of the place where such death occurred and service of process in
such place may be had upon defendant in such place." It was by virtue
of this amendment that appellant sought to enforce her cause of action
arising by virtue of the provisions of the Illinois statute in
the courts of this state. Under the provisions of the Illinois
statute, assuming that the original complaint stated a cause of action

favor of Margaret Bodine, as surviving widow, still her right to according to the allegations of the original complaint terminated January, 1935, and at that time the amendment of 1935 had not become effective and the Circuit Court of Stark County was without jurisdiction to entertain appellant's suit until the amendment to the Injuries Act did become effective, which was July 1, 1935. Counsel appellant argue, however, that the final judgment in this cause entered on May 26, 1936, and at that time the 1935 amendment was in force, that this amendment related to procedure or remedy only and at that time, the public policy of this state, as declared by that amendment, authorized appellant to maintain her cause of action in the Circuit Court of Stark County, the question presented by the motion to dismiss was not a question of jurisdiction and the trial court erred in holding that it was and in rendering judgment against appellant.

In the view we have taken of appellant's original complaint, it is not necessary for us to pass upon this question. What we hold is that the original complaint did not state a cause of action under the provisions of the statute of Missouri, that a cause of action was stated for the first time by the amendment filed August 26, 1935, and that the cause of action at that time was barred by the provisions of the Missouri Statute and irrespective of the construction which might be placed upon the amendment to the Injuries Act of 1935, the trial court properly sustained appellee's motion to dismiss and properly affirmed the judgment appealed from and that judgment will therefore be affirmed.

JUDGMENT AFFIRMED.

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in force, that this amendment related to procedure or remedy only and
that time, the public policy of this state, as declared by that
ment, authorized appellant to maintain her cause of action in the
it Court of Stark County, the question presented by the motion to
as was not a question of jurisdiction and the trial court erred in
and that it was and is rendering judgment against appellant.
In the view we have taken of appellant's original complaint,
not necessary for us to pass upon this question. What we hold
at the original complaint did not state a cause of action under
provisions of the statute of Missouri, that a cause of action
dated for the first time by the amendment filed August 26, 1935,
the cause of action at that time was barred by the provisions of
Missouri Statute and irrespective of the constitution which might
based upon the amendment to the Injuries Act of 1935, the trial
properly sustained appellee's motion to dismiss and properly
red the judgment appealed from and that judgment will therefore
be affirmed.

JUDGMENT AFFIRMED.

STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I. JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and thirty-_____

Clerk of the Appellate Court

687

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the sixth day of October, in the year of our Lord one thousand nine hundred and thirty-six, within and for the Second District of the State of Illinois:

Present -- the Hon. BLAINE HUFFMAN, Presiding Justice.

Hon. FRANKLIN R. DOVE, Justice.

Hon. FRED G. WOLFE, Justice.

287 I.A. 6364

JUSTUS L. JOHNSON, Clerk.

RALPH H. DESPER, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On
NOV 30 1936 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT.
JUNE TERM, A. D. 1934.

<p>F. W. MASKE,</p> <p style="padding-left: 100px;">Plaintiff (Respondent.)</p> <p style="padding-left: 100px;">vs.</p> <p>LEWIS KOCK, JESSIE KOCH, J. MANLEY CLARK, Trustee, BRIDGET ROCHE, ROSA WAGNER, F. H. ALTEMEIR, Receiver of Pearl City State Bank, ORIE W. DOW, Trustee, and "UNKNOWN OWNERS",</p> <p style="padding-left: 100px;">Defendants (Respondents.)</p>	<p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p>	<p>Appeal from the Circuit Court of Stephenson County.</p>
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Wolfe J.

The statement of the case by the petitioner, with the exception of a slight correction, as suggested by the appellee, is conceded to be correct and is as follows: "On March 2, 1925, at Freeport, Illinois, Lewis Koch and Jessie Koch, his wife, being indebted to the First National Bank of Freeport, Illinois, in the principal sum of \$9,000.00, made, executed and endorsed six certain promissory notes, three in the principal sum of \$1,000.00, each, and three in the principal sum of \$2,000.00 each, and all payable to the order of "Themselves" five years after date, together with interest at the rate of 5 $\frac{1}{2}$ % per annum. In order to secure the notes the same parties simultaneously executed their deed of trust, which was duly recorded, conveying certain premises in Stephenson County, Illinois, to J. Manley Clark, Trustee.

Some time after the execution of the notes and trust deed the respondents (plaintiffs) purchased five of the notes

IN THE
COURT OF THE COMMON PLEAS

SECOND DISTRICT

JUNE TERM, A. D. 1934.

Appeal from the
Circuit Court
of Stephenson
County.

LEWIS KOCH, JESSIE KOCH, J. MANNY
CLARK, Trustee, BRIDGET KOCH, ROSSA
WAGNER, F. H. ALTMAYER, Receiver of
Pearl City State Bank, OMAH A. DOW,
Trustee, and "UNKNOWN OWNERS",
Defendants (Respondents.)
vs.
T. W. WOLFE,
Plaintiff (Respondent.)

Wolfe J.

The statement of the case by the petitioner, with the
exception of a slight correction, as suggested by the appellee,
is conceded to be correct and is as follows: "On March 2, 1925,
at Freeport, Illinois, Lewis Koch and Jessie Koch, his wife,
being indebted to the First National Bank of Freeport, Illinois,
in the principal sum of \$9,000.00, made, executed and endorsed
six certain promissory notes, three in the principal sum of
\$1,000.00, each, and three in the principal sum of \$2,000.00,
each, and all payable to the order of 'Themselves' five years
after date, together with interest at the rate of 5% per annum.
In order to secure the notes the same parties simultaneously ex-
ecuted their deed of trust, which was duly recorded, conveying
certain premises in Stephenson County, Illinois, to J. M. Mann,
Clark, Trustee.

Some time after the execution of the notes and trust
deed the respondents (plaintiffs) purchased five of the notes

for value but without endorsement or written assignment from the First National Bank of Freeport, Illinois. The sixth note in the amount of \$2,000.00 was retained by the latter bank and later came into the possession of the petitioner upon his appointment as receiver of the bank by the Comptroller of the Currency on October 9, 1933.

All of the notes matured on March 2, 1930, but the holders continued to accept interest at the rate of $5\frac{1}{2}\%$ per annum, although the notes specified a higher rate, until March 2, 1933. No interest having been paid from the latter date, on March 13, 1934, the respondent (plaintiff), F. W. Maske, filed his complaint in chancery, later joined in by the other plaintiffs, in the Circuit Court of Stephenson County, Illinois, to foreclose the said trust deed. The complaint prayed for a decree of sale and for the distribution of the proceeds of sale proportionately amongst the holders of notes except as to the petitioner, Arthur E. Crum, Receiver of The First National Bank of Freeport, Illinois, holder of the said note for \$2,000.00.

To this complaint the petitioner filed his answer, which was later amended, admitting the various allegations upon which the right to foreclose was predicated, but demanding strict proof as to the making of the loan to the mortgagors by The First National Bank of Freeport, Illinois. The amended answer further specifically denied the right of the plaintiffs to priority in the distribution over the petitioner, and denied that the latter's claim should be subordinated to that of the other holders of notes.

The Court after a hearing found for the plaintiffs, entered a decree of foreclosure in substantial conformity with the prayer of the complaint, and ordered, among other things, that the

for value but without endorsement or other assignment from the First National Bank of Freeport, Illinois. The sixth note

in the amount of \$2,000.00 was retained by the latter bank and later came into the possession of the petitioner upon its appointment as receiver of the bank by the Comptroller of the Currency on October 9, 1933.

All of the notes matured on March 2, 1930, but the

holders continued to accept interest at the rate of 5% per

annum, although the notes specified a higher rate, until March 2, 1933. No interest having been paid from the latter

date, on March 18, 1934, the respondent (plaintiff), T. W. Maske, filed his complaint in chancery, later joined in by the other plaintiffs, in the Circuit Court of Stephenson County, Illinois, to foreclose the said trust deed. The complaint

prayed for a decree of sale and for the distribution of the proceeds of sale proportionately amongst the holders of notes except as to the petitioner, Arthur E. Cram, Receiver of the First National Bank of Freeport, Illinois, holder of the said note for \$2,000.00.

To this complaint the petitioner filed his answer, which was later amended, admitting the various allegations upon which the right to foreclose was predicated, but demanding strict proof as to the making of the loan to be foreclosed by the First National Bank of Freeport, Illinois. The amended answer further specifically denied the right of the plaintiffs to priority in the distribution over the petitioner, and denied that the latter's claim should be subordinated to that of the other holders of notes. The Court after a hearing found for the plaintiffs, and

entered a decree of foreclosure in substance as follows: "And the prayer of the complaint, no order, except where shown, that the

Premises should be sold; that out of the proceeds of sale the Master should, after deducting expenses, pay to the noteholders other than the petitioner, Arthur E. Crum, Receiver, their proportionate shares; and that in case the premises should sell for more than sufficient to pay all of said sums then he should apply the balance toward the satisfaction of the amount of \$2,140.56, found due the petitioner.

Pursuant to said decree the Master duly advertised the premises for sale and on July 24, 1934, the premises were sold to the respondents, F. W. Maske, Bridget Roche and Rosa Wagner, for \$8,224.79, which was a sum sufficient to return to said respondents the exact amounts due them after deducting all costs, expenses, commissions, et cetera. The Master later executed his certificate to the purchasers and rendered a report of sale and distribution which was eventually filed and approved by the Court May 18, 1935.

The petitioner now seeks an appeal to this Court to review said decree, asking a reversal or modification of the same for the specific errors hereinafter set forth."

This case was submitted to this Court at the June Term, A. D. 1934, but no opinion had been prepared because a similar case had been presented to the Supreme Court on a writ of certiorari. The case is Anna Domeyer et al., appellees vs. William L. O'Connell, Receiver, et al., appellants, Docket No. 22999, which, at this time has not been reported in the advanced sheets. The identical question in this case was decided in the Domeyer case, and the Court in their opinion say: "We are of the opinion that neither logically nor equitably can it be said that an assignee who purchases what he must be held to know is but a

Premises should be sold; that out of the proceeds of said sale Master should, after deducting expenses, pay to the respondents other than the petitioner, Arthur L. O'Connell, Receiver, their proportionate shares; and that in case the premises should sell for more than sufficient to pay all of said debts then he should apply the balance toward the satisfaction of the amount of \$2,147.56, found due the petitioner.

Pursuant to said decree the Master duly advertised the premises for sale and on July 24, 1934, the premises were sold to the respondents, T. W. Maske, Bridget Roche and Rose Wagner, for \$8,324.79, which was a sum sufficient to return to said respondents the exact amounts due them after deducting all costs, expenses, commissions, et cetera. The Master later executed his certificate to the purchasers and rendered a report of sale and distribution which was eventually filed and approved by the Court May 18, 1935.

The petitioner now seeks an appeal to this Court to review said decree, asking a reversal or modification of the same for the specific errors hereinafter set forth.

This case was submitted to this Court at the June Term, A. D. 1934, but no opinion had been prepared because a similar case had been presented to the Supreme Court on a writ of certiorari. The case is *Anna Dwyer et al., Appellees vs. William L. O'Connell, Receiver, et al., Appellants*, 100 N. D. 3299, which, at this time has not been reported in the advanced sheets. The identical question in this case was decided in the Dwyer case, and the Court in that opinion says: "We are of the opinion that neither logically nor equitably can it be said that an assignee who purchases what he was to receive from the estate

part of the mortgagge debt is entitled to have his note paid in full out of an insufficient security merely because of the assignment, without more. The logical and equitable principles which should control in a situation where, as here, all notes mature on the same day, bring us to the conviction that assignees and the mortgagee should share pro rata in the proceeds of insufficient security."

The Judgment of the Circuit Court of Stephenson County should be and is hereby reversed and the cause remanded to said Court.

Reversed and Remanded.

part of the mortgage debt is admitted to have his note void in full out of an insufficient security merely because of the assignment, without more. The logical and equitable principles which should control in a situation where, as here, all notes mature on the same day, bring us to the conclusion that assignees and the mortgagees should share pro rata in the proceeds of insufficient security."

The judgment of the Circuit Court of Stephenson County should be and is hereby reversed and the cause remanded to said Court.

Reversed and Remanded.

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause. of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and thirty-_____

Clerk of the Appellate Court

STATE OF ILLINOIS
APPELLATE COURT
FOURTH DISTRICT

Term No. 9

May Term A. D. 1936

Agenda 13

Jennie Reed,
Administratrix of the Estate
of Lincoln Reed, Deceased.
Plaintiff, Appellant

vs.

Cecil Bergin,
Defendant, Appellee

Appeal from the Circuit
Court of Fayette County.

287 I.A. 636

L. E. Stone, Presiding Judge

For something more than a year prior to September 17, 1935, Lincoln Reed and Cecil Bergin had been engaged as partners in a grocery and meat business in Vandalia, Illinois under the firm name of Reed and Bergin. On that date, Lincoln Reed died intestate. Bergin as surviving partner proceeded, as was his obligation, under the statute to wind up the partnership business. He prepared an inventory of the partnership property and had said property appraised by appraisers duly appointed by the County Court. By said inventory and appraisement was found that the assets of said Estate amounted to \$3,238.79 while the indebtedness of said firm was \$5,497.86, leaving a deficit of \$2,259.07.

Later, Plaintiff Appellant was appointed administratrix of the Estate of Lincoln Reed and on September 26, 1935 filed in the County Court of Fayette County, where said estate was being administered, her petition asking that Bergin, the surviving partner, might be allowed to take over the interest of her intestate's estate in the partnership estate with the understanding that Bergin, the surviving partner, should assume the obligations of the partnership estate. A hearing on said petition was had in the County Court, and said petition was allowed.

In November of the same year Appellant filed in the County Court another petition in which she asked said court to vacate and set aside the order on the former petition by virtue of which she had been allowed to turn over her intestate's share in the partnership property to Bergin the surviving partner. In this petition, Plaintiff Appellant alleged that she had been defrauded by Defendant Appellee and procured to make an unfair and disadvantageous settlement with him. Acts of misrepresentation were charged by her against one of the Attorneys for Appellee in that he misinformed her as to the true condition of the partnership estate and that he induced her to act to her detriment at a time when she was mentally disturbed by bereavement and incapable of understanding the condition of affairs before her; she further charged as specific acts of fraud that the condition of the partnership estate as shown by the inventory and appraisement bill, and the list of indebtedness was false and untrue and that said instruments did not honestly reflect the condition of the partnership estate, whereas she was made to believe that they did.

On hearing in the County Court this petition was denied. An appeal was taken to the Circuit Court where said petition was again denied. Plaintiff Appellant brings the record here on appeal.

It is indisputably the law of Illinois that a surviving partner is required to make a true and perfect inventory of all the partnership assets and to cause to be made a fair and just appraisement of all such property. It is also incumbent upon interested parties to point out to the court by objections any inaccuracies in said instruments. Had Plaintiff Appellant filed her objections to these instruments, we doubt not that the court would have required Defendant Appellee to correct any errors that appeared had there been such. This she did not do, but relies for relief solely upon her aforesaid petition.

Fraud is never presumed but requires the strictest proof. American Haist. etc. Co. vs. Hall 208 Ill. 597; Kennedy vs. Kennedy 194 Ill. 346; Mortimer vs. McCullen 202 Ill. 413; Fraud cannot be established by a pleading, however extravagant its statements may be.

An examination of the evidence in this case shows that the inventory and appraisement of the partnership property were made in the usual and customary way. The appraisement was made by appraisers in whom appellant apparently had confidence. It is quite probable that slight discrepancies crept into the appraisement and inventory as is likely to happen in taking an invoice of a stock of merchandise. But if all such were taken as true in this case it would still leave the estate of Plaintiff's intestate such indebted to the partnership when the indebtedness of said partnership is placed over against the assets. If this is true, how could the estate of Plaintiff's intestate be injured? Far from showing that Plaintiff Appellant was defrauded this record shows that she was benefitted by the course that was taken.

This record involves questions of fact which have been considered by two courts, before both arriving at the same conclusion. We find no warrant for disturbing those conclusions.

The judgment of the Circuit Court is affirmed.

Judgment Affirmed.

Not to be published in full

IN THE
APPELLATE COURT OF ILLINOIS
FOURTH DISTRICT

MAY TERM A. D. 1936.

287 I.A. 637

JOHN KASSLY and VICTORIA BARTON,
(John Kassly, Appellee),)

vs)

METROPOLITAN LIFE INSURANCE
COMPANY,
Appellant.)

Appeal from the
City Court of the
City of East
St. Louis.

STONE, P.J.,

This is a suit brought by John Kassly, appellee, and Victoria Barton, against appellant, Metropolitan Life Insurance Company, in the City Court of East St. Louis. Claim of appellee is for the recovery of \$733.00 funeral expenses incurred in the burial of Alex W. Dimond. The claim of Victoria Barton is not involved in this appeal.

Paragraph 1 of count 1 alleges that Alex W. Dimond died on April 14, 1935, in the City of East St. Louis; that his relatives applied to appellee, then engaged in the general undertaking business, for the burial of ~~the~~ deceased, and informed appellee that appellant was indebted or had money in its hands by virtue of a certain life insurance policy No. 116687969 issued by appellant, insuring the life of Alex W. Dimond.

Paragraph 2 alleges that before appellee rendered any services, appellant, through its general manager of its East St. Louis branch, ordered appellee to proceed with the burial, to make funeral arrangements and promised to pay appellee promptly, on demand, for his services, goods and merchandise furnished not exceeding the face amount of

1900

THE SECRETARY OF THE

OFFICE OF THE SECRETARY

1900

This is to certify that the following is a true and correct copy of the original as it appears in the records of the Department of the Interior, Bureau of Land Management, at Washington, D. C., this 1st day of November, 1900.

Witness my hand and the seal of the Department of the Interior at Washington, D. C., this 1st day of November, 1900.

JOHN H. HARRIS, Secretary of the Department of the Interior.

Approved: _____

of the Department of the Interior, Bureau of Land Management, at Washington, D. C., this 1st day of November, 1900.

The first of the following is a true and correct copy of the original as it appears in the records of the Department of the Interior, Bureau of Land Management, at Washington, D. C., this 1st day of November, 1900.

the insurance policy, which amounted to about \$1,500.00.

Paragraph 3 alleges that relying solely upon the promise of appellant, as set out in paragraph 2, appellee proceeded to advance and did advance his services and furnished all the necessary goods, merchandise and equipment for the funeral and burial of deceased, and, in all respects performed his side of the agreement, and that his claim amounts to \$733.00.

Paragraph 4 alleges that appellant, through often requested, has not paid the same, and demands judgment against appellant in the sum of \$733.00 and interest.

A copy of the policy involved was filed by the plaintiffs in the suit by order of the Court. The policy is what is commonly called an industrial policy. It was issued by appellant to A. White Dimond on January 1, 1934. The amount of the insurance is \$740.00 with the provision that double such amount ~~should be~~ would be paid in case death is caused by external, violent and accidental means, etc., and provides for payment upon receipt of proofs of death, etc., to the executor or administrator of the insured unless payment be made under the provisions of the next succeeding paragraph. This paragraph provides, in substance, that appellant may make any payment to the insured's husband or wife, or any relative by blood or connection by marriage of the insured, or to any other person appearing to appellant to be equitably entitled to the same by reason of having incurred expense on behalf of the insured, or for his or her burial, and that the production of a receipt signed by either of said persons ~~at~~ shall be conclusive evidence that all claims under the policy have been satisfied.

The policy further provides it constitutes the entire agreement between appellant and the insured, and the holder or owner thereof; that its terms cannot be changed or its conditions varied except by the express agreement of appellant, evidenced by the signature of its president or secretary; that agents, including managers and assistant managers, are not authorized and have no power to make, alter or discharge contracts.

The answer admits that Alex W. Dimond died April 14, 1935. The answer states that appellant has no knowledge as to whether or not the relatives of Alex W. Dimond applied to appellee for the burial of his body, or whether or not said relatives informed appellee that appellant was indebted or had money in its hands by virtue of the life insurance policy mentioned.

The answer denies that before appellee rendered any service towards the burial, or at any other time, appellant ordered appellee to proceed with the burial or to make funeral arrangements or promised to pay appellee promptly on demand or otherwise for his services, goods, merchandise, etc.

The answer denies that appellee, relying upon the alleged promise of appellant, proceeded to advance and did advance his services and furnish the necessary goods, merchandise, etc., for the funeral and burial of the deceased.

The issue, therefore, was whether or not appellant ordered appellee to make funeral arrangements for and bury Alex W. Dimond, and promised to pay appellee for his services, goods, merchandise, etc., furnished.

Alex W. Dimond was killed April 14, 1935, in an

automobile accident with a train. His widow was badly hurt in the same accident. The widow could not look after the funeral arrangements because of her injuries. Victoria Barton, a sister of the deceased, and R. F. Reader, a friend of the deceased, called on Wm. T. Sheehy, the manager of the branch office of appellant in East St. Louis, with reference to the funeral expenses before the funeral. Mrs. Barton says that they told Mr. Sheehy that Mr. Kassly would like to have some assurance the bills would be paid out of the insurance, and that Mr. Sheehy replied not to worry about it, it would be taken care of out of the insurance. She also says they told Mr. Sheehy they came to have him talk to Mr. Kassly and to assure him of the payment of the undertaker's bill, so the body could be taken care of, and that Mr. Sheehy said Mr. Kassly need not worry, it would be taken care of out of the insurance.

Mr. Reader's says that Mrs. Barton and he selected the casket, clothing, etc., and that they wanted to know if it was going to be paid for out of the insurance, and they told Mr. Sheehy their purpose; that Mr. Sheehy said that everything would be all right; that Mr. Sheehy said that everything was all right, everything would be taken care of, the bill would be a lien against the policy.

Otho Jackson, an employe of appellee, says that Mr. Sheehy called appellee's office before the funeral, asked for appellee and then stated to him: "This is Mr. Sheehy of the Metropolitan Life Insurance Company. You tell Mr. Kassly everything is all right; plenty of insurance down here to take care of an ordinary case. Go ahead with the funeral."

Appellee says that Mr. Sheehy told him before the funeral that the funderal expenses would be taken care of through the policy carried on Mr. Dimond's life. He said he believed he gave Mr. Sheehy a bill or gave him the amount of the funeral bill after the funeral, and that Mr. Sheehy assured him that the expense would be paid, but he (Sheehy) said the bill was a little too high. He also said that Mr. Sheehy did not tell him in so many words that appellant would pay him; that he took it for granted that the bill would be paid by appellant.

Appellant objected to each of these conversations with Mr. Sheehy on the ground that appellant would not be bound by any statement Mr. Sheehy would make.

Mr. Sheehy testified that he never told either Mrs. Barton or Mr. Reader or Mr. Kassly that appellant would pay the funeral bill.

Clayton LaBlantz, a brother-in-law of the widow, testified that appellee talked to him about this funeral bill two or three different times at his home after the funeral; that in none of these conversations did he claim that appellant was to pay the bill, but he was wanting Mr. Black, the widow's father, to pay the bill.

The widow was paid the full amount of the policy, including the accidental death benefit.

Mr. Sheehy testified that his office is in the Murphy Building in East St. Louis; that he had been manager of the branch office of appellant in East St. Louis since 1920; that he was head of the office; that he had four assistant managers and thirty-one agents under him; that he made recommendations as to the clerks who worked in the office to the company, and that the company approves or

rejects; that

appellant is at No. 1

Madison avenue,

by; that the territory over

which he has jurisdiction is East St. Louis, Columbia,

Waterloo and Milstadt, in the State of Illinois; that it

is the only territory with which he has anything to do; that

he was not an officer nor a director of appellant. He

testified that his duties in general were looking after or

recommending ~~men~~ men to the company for agents and super-

vising the collecting of premiums; that the men under him

solicited insurance, and he supervises them; that he trans-

mits the premiums collected every week to appellant; that he

did not have any power and never at any time did have power

to adjust or settle claims against appellant; that all such

matters are submitted to the company for their decision; that

he never at any time had any power or authority to determine

to whom the proceeds of an industrial policy should be paid,

or any part of it; that those matters are adjusted by the

company; that he never at any time made a determination as

to whom any portion of the proceeds of an industrial policy

should be paid; that he did not have the power to do so; that

those matters are determined by the claim division in New

York, and if a technical case it is determined by the home

office in New York. That he just sends in the facts and they

make the decisions.

Appellee testified, over appelant's objection,

that about a year and a half prior to Mr. Dimond's death

Joseph Dulmovich, who had an industrial policy with appellant,

died, and that appellee was paid by appellant \$454.75, and that

Mr. Sheehy delivered the check to him.

A jury was waived and the cause was tried before

the Court. Appellant submitted one proposition of law which

was refused by the Court. The Court decided appellee's

claim in favor of appellee and rendered judgment in favor of appellee and against appellant in the sum of \$733.00 and costs on that claim. The court decided Victoria Barton's claim in favor of appellant and rendered judgment in favor of appellant and against Victoria Barton in bar of her claim.

The policy was paid in full to the widow. Though the date of payment is not disclosed, it was obviously after the acceptance of the assignment of the policy and after the conversation which Appellee claims as the basis of the contract between the parties. The evidence discloses facts sufficient to amount to a contract between the parties. In other words, appellee has proven his case by a preponderance of the evidence, assuming that the witness Sheehy had authority to bind appellant to the agreement he made with appellee. So that it appears that the question before the Court is, Did Sheehy, as general manager of appellant have authority to bind his principal to the said agreement.

The policy provides that its terms cannot be changed or its conditions varied except by the express agreement of appellant, evidenced by the signature of its president or secretary; that agents, including managers and assistant managers are not authorized and have no power to make, alter or discharge contracts.

The authorities cited by appellant do not seem to us to be decisive of the ~~max~~ issue here, granting that they do recite the existing law of the state when applied to facts such as they recite, and other parallel states of fact. Sheehy was a general agent for a large territory. He held himself out to the world as one

possessing authority appellant to act in the capacity in which he did act in this case. Color was given to his authority so to act so far as appellee was concerned. He had transacted a similar business with the said agent before and his act had been ratified by appellant. Appellee's warrant to act under the agreement with appellant's general agent Sheehy seems to us to have been sufficient.

Where a private corporation allows its managing officer so to conduct himself in his dealings on behalf of the company as to lead the public and those dealing with him reasonably to believe that he possesses certain powers, the company will not be allowed to question such apparent power or authority as against one relying in good ~~fact~~ faith on the same. McDonald vs Chisholm, 131 Ill. 273.

When an act pertaining to the business of a corporation which is not foreign to the ~~the~~ corporate powers, is done by an officer within his department it will be presumed to have been done with the consent of the corporation. Bank of Minneapolis vs Giffin, 168 Ill 314.

A principal may be bound ~~to~~ to the extent of the apparent authority which he has conferred upon his agent. This is upon the theory that the principal causes others to believe the powers of the agent to be greater than those actually conferred. Merchants' National Bank vs Hart, 223 Ill. 41-50.

The acts which amounted to such representation in this case were known to appellee. He had so dealt with the same agent before.

We are of the opinion that the transaction

carried on between the parties under the facts and circumstances, has the indicia of implied authority in appellant's agent Sheehy to act for his principal in the matter in hand, and that appellant cannot now repudiate that authority.

As to the claim of Victoria Barton, we think the court ruled correctly. Whatever the significance of the assignment of the policy, it was not made for the use and benefit of Victoria Barton, but to insure the payment of Appellee's claim.

The Judgment of the City Court is affirmed.

JUDGMENT AFFIRMED.

Not to be Published in Full

ordered the balance of the money to be paid to
the plaintiff, and the defendant to pay the balance of
the money to the plaintiff. The plaintiff is now
in possession of the money and the defendant is
in possession of the money.

It is the duty of the plaintiff to pay the
money to the defendant. The defendant is now
in possession of the money and the plaintiff is
in possession of the money. The plaintiff is now
in possession of the money and the defendant is
in possession of the money. The plaintiff is now
in possession of the money and the defendant is
in possession of the money.

Very truly yours,
J. B. Smith

29

17

STATE OF ILLINOIS,
APPELLATE COURT,
FOURTH DISTRICT.

Agenda 19.

May Term, 1936.

Term No 18

ert Sansewicz,

Appellee,

vs.

George Petroff,

Appellant.

Writ of Error to Circuit Court of
Franklin County.

287 I.A. 637²

EDWARDS, J.

Appellee sued for and recovered in the Circuit Court of Franklin County a judgment for \$817.50 for damages to certain chattels belonging to appellee, which were injured in transit from Johnson City to Pontiac, by a collision between the truck driven by a servant of appellant and one operated by Ben Avery-which contained the goods of appellee. The cause was heard by the court without a jury.

Appellant contends chiefly that Avery was the servant of appellee at the time of the accident, and that he was then guilty of negligence which proximately contributed to cause the injury and damage.

Appellee's position was that he had engaged one Ray Beaver to transport the chattels, and that Beaver had employed Avery to assist him in the work; that Beaver was an independent contractor; that Avery was his servant and that appellee had no control over the latter, and hence was not bound by nor answerable for his negligence, if he was guilty of such.

The complaint filed by appellee avers that at the time of the accident, appellee, "by his then agents and servants in that behalf, was

12

OFFICE OF THE
DIRECTOR
OF THE
BUREAU OF
THE
FEDERAL
BUREAU OF
INVESTIGATION

12/18/18

TO THE DIRECTOR OF THE
BUREAU OF THE
FEDERAL
BUREAU OF
INVESTIGATION

RECEIVED
DECEMBER 18, 1918
FEDERAL BUREAU OF INVESTIGATION

287 A. 887

12/18/18

Enclosed for the Bureau are two copies of a letterhead memorandum dated and captioned as above. The letterhead memorandum is being submitted to the Bureau for its information and for its consideration. The letterhead memorandum is being submitted to the Bureau for its information and for its consideration. The letterhead memorandum is being submitted to the Bureau for its information and for its consideration.

Very respectfully,
Special Agent in Charge
Enclosed for the Bureau are two copies of a letterhead memorandum dated and captioned as above. The letterhead memorandum is being submitted to the Bureau for its information and for its consideration. The letterhead memorandum is being submitted to the Bureau for its information and for its consideration. The letterhead memorandum is being submitted to the Bureau for its information and for its consideration.

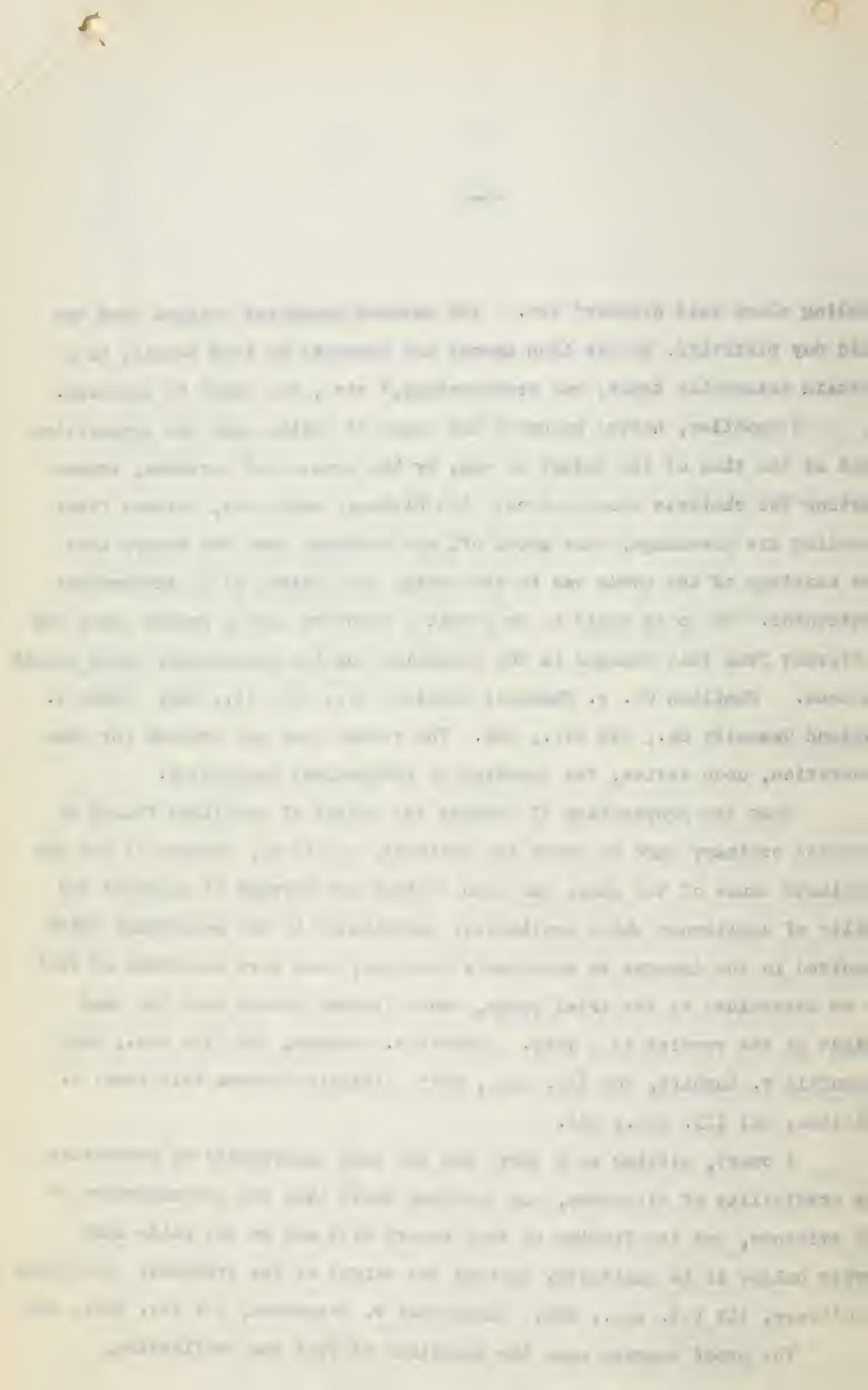
hauling along said highway" etc. The amended complaint alleges that "on said day plaintiff, by his then agents and servants in that behalf, in a certain automobile truck, was transporting," etc., the goods in question.

Appellee, having grounded his cause of action upon the proposition that at the time of the injury he was, by his agents and servants, transporting the chattels along and over the highway, could not, without first amending his pleadings, make proof of, nor recover, upon the theory that the carriage of the goods was in the charge and control of an independent contractor. To do so would be to permit a recovery upon a ground other and different from that charged in the complaint and its amendments, which cannot be done. *Hamilton Co. v. Channell Chemical Co.*, 327 Ill., 362; *Feder v. Midland Casualty Co.*, 316 Ill., 552. The record does not present for consideration, upon review, the question of independent contractor.

Upon the proposition of whether the driver of appellant failed to exercise ordinary care to avert the accident, and if so, whether it was the proximate cause of the same, and also whether the servant of appellee was guilty of negligence which proximately contributed to the occurrence which resulted in the damages to appellee's chattels, same were questions of fact to be determined by the trial judge, whose finding should have the same weight as the verdict of a jury. *Katzoff v. Goodman*, 197 Ill. App., 488; *Rosenfeld v. Ehrhart*, 202 Ill. App., 617; *Illinois-Indiana Fair Assn. v. Phillips*, 241 Ill. App., 454.

A court, sitting as a jury, has the same opportunity of determining the credibility of witnesses, and deciding where lies the preponderance of the evidence, and its finding in that regard will not be set aside upon review unless it is manifestly against the weight of the evidence. *Broderick v. O'Leary*, 112 Ill. App., 658; *Rademacher v. Greenwood*, 114 Ill. App., 542.

The proof bearing upon the questions of fact was conflicting,



nce it was the province of the court to determine the truth. We cannot
y that the holdings were unsupported by the evidence, and our duty in such
se is to not interfere with the finding. Tarjan v. Regelin, 202 Ill. App.,
0; Davis v. Smith, 132 Ill. App., 589.

Judgment affirmed.

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30

IN THE
APPELLATE COURT
OF ILLINOIS,
FOURTH DISTRICT:

11

H

Helen Kuntz,

vs.

John Hancock Mutual Life
Insurance Company,

Appellee,

Appellant.

Appeal from the
City Court of the
City of East
St. Louis.237 I.A. 637³

Martha J.

Term 117

Agenda 11

Helen Kuntz, appellee, referred to herein as plaintiff, brought this action as beneficiary in eight insurance policies issued by the defendant, insuring the life of August Kuntz, husband of the plaintiff. After the issuance of the several policies the defendant issued an accident certificate which in substance provided that if the insured sustained bodily injury solely through external, violent and accidental means occurring after the date thereof and resulting in the death of the insured within 90 days from the date of such injury, and while the policies were in full force the defendant would, in addition to the other sums due, pay a sum equal to the face amount of insurance stated in the policy. The face of each of the policies was paid and by this action plaintiff seeks to recover the additional insurance provided for under the accident certificate.

A trial with a jury resulted in a verdict and judgment for the plaintiff for \$2740 the full amount claimed.

As grounds for reversal defendant urges that the court erred in overruling its motions for a directed verdict and a new trial.

The evidence shows that on April 10, 1920 the insured suffered certain scalds and burns on his left arm, leg and the left side of his abdomen. No question is raised but what such injuries were accidental but defendant contends that plaintiff

has not proven that these injuries caused the death of the insured. The injuries were of such a nature that he did not return to his employment for some time and was under the care of a doctor. Dr. Knight gave him medical attention the first week after the injury and Dr. Godfrey, a physician furnished by his employer, gave him medical care from April 23 to May 28. On the latter date the doctor discharged him as cured and he returned to his employment June 4th. He worked that day and part of June 5th when he became ill and he returned to his house. Dr Knight was again called and cared for him until his death June 8th.

There is evidence which tends to prove that at the time the insured returned to his employment there was an unhealed place on his arm and several smaller unhealed places on his left thigh which were not bandaged.

Dr. Knight testified that when he was called, in last illness, there were unhealed places on his left leg and shoulder that he had a cold or influenza which later developed into pneumonia and he gave it as his opinion that the burns had weakened his physical condition thereby making him subject to pneumonia.

Dr. Godfrey testified that the burns had healed when he last saw him on May 28th and that as early as May 20th the insured was physically able to work. He gave it as his opinion that the injuries did not cause the pneumonia and that they had no connection therewith.

Upon a motion for a directed verdict the sole question for the trial court to determine is whether there is any evidence, ~~when~~ assuming it to be true, which proves or tends to prove the material elements of plaintiff's case. If there is the motion should be overruled. The court properly overruled the motion for a directed verdict.

Defendant further contends that the verdict is against the manifest weight of the evidence.

Plaintiff testified that on June 4th the day insured returned to work, he had open sores on his left arm which were bandaged, that there were several small unhealed places on his left thigh which were not bandaged. that on June 5th he came

home from work about three P. M., that he was ill and went to bed remaining there until his death June 8th, that Dr. Knight was called June 6th to attend him.

Dr. Knight testified for plaintiff and was uncertain as to dates of treatments but was sure he attended insured in his last illness, he described the open sores caused by the burns and gave it as his opinion that the pneumonia was caused from the weakened condition created by the injuries. We quote a part of his testimony as follows: "Pneumonia usually starts from exposure of some kind, usually from getting wet. He did get wet when he got his burns. The radiator exploded, threw steam, and that was the way I connected the cause of his pneumonia with the burn. My opinion is that the death of August Kuntz was caused from his pneumonia, contracted from his exposure and the burns." He also testified that in the first death certificate he gave the cause of death as chronic mycarditis brought on by acute alcoholism but that he had now changed his mind as to the cause of death. On cross examination he admitted that plaintiff had repeatedly urged him to change his mind as to this material point and that he finally consented to it.

Gordon Hathway an insurance solicitor for another company testifying for the defendant stated that he solicited insured for insurance the week preceeding May 5th 1930 and that insured then signed an application for insurance in which he had said he was in sound health, that no physician had told him to take treatments and that he had not suffered from any disease or ailments.

Dr. Godfrey testified that the burns were cured on May 28th when he discharged him as cured and gave it as his opinion that the burns could not have caused or contributed to the death of insured.

William Accola a fellow employee of insured testified as to how the accident happened on April 16th, that the reason he quit his employment June 5th was lack of work to do; that he

knew of insured using intoxicating liquor, that he always had a bottle and drank at home and when at work, that he called to see him in his last illness and saw him drink liquor on at least two of these visits.

The testimony of R. L. McAdoo a fellow employee corroborated Accola as to the insured's habit of drinking intoxicating liquor and the reason for his quitting work on June 5th.

This is all the evidence that bears upon the cause of death. We are satisfied that there would be sufficient evidence to support a finding that the burns of the insured had not fully healed when he returned to work but there is no evidence that the burns caused plaintiff to become weakened physically. Nor is there any evidence describing the extent of the burns or the pains suffered or any other facts from which it could be reasonably inferred that such injuries would result in a weakened physical condition. Dr. Knight in giving his reasons upon which he based his opinion stated that pneumonia usually starts from exposure of some kind, usually from getting wet and then concludes that the insured became wet from the steam that caused the burns. It is undisputed that the accident occurred April 16th and that pneumonia did not develop until June 6th. Without the development of a weakened physical condition or some other condition connected with the burns it is improbable that pneumonia would follow after such a lapse of time. Dr Knight has on other occasions made statements as to the cause of death which conflicts with his evidence in this case. Without the opinion evidence of Dr. Knight there is nothing to support the finding that the accidental injuries caused or contributed to his death.

We are impelled to hold that the plaintiff has not established her case and that the verdict is against the manifest weight of the evidence.

It is the settled law of this state that if the verdict is manifestly against the weight of the evidence it is the duty of the trial court to set it aside and grant a new trial and a failure to do so is error for which a judgment must be reversed.

Donelson v East St. Louis Ry. Co., 235 Ill. 625; Belden, v Innis, 84 Ill. 78.

The records shows that this case has been twice tried resulting each time in a verdict for the plaintiff and we have given full credit to that fact but after a consideration of all the evidence we are constrained to hold this verdict is against the weight of the evidence and that the judgment should be reversed.

Judgment of the circuit court reversed and the cause remanded.

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31

IN THE
APPELLATE COURT
OF ILLINOIS
FOURTH DISTRICT.

John M. Karns, Administrator of
the Estate of Carol E. Graves,
Deceased,

Plaintiff-Appellee

vs.

The Prudential Insurance

Company of America

Defendant-Appellant.

27.
Appeal from the
Circuit Court of
St. Clair County,
Illinois.

287 I.A. 637⁴

Murphy J.

Plaintiff, appellee instituted this suit against defendant appellant in justice court to recover on an industrial insurance policy issued by defendant appellant insuring the life of Carol E. Graves, plaintiff appellee's intestate. On appeal to circuit court the case was tried before the court without a jury and resulted in a judgment for plaintiff and this appeal is from that judgment.

This policy was issued in November 1926 with a face value of \$400. The premium rate was 25 cents per week. In 1928 the policy lapsed but was reinstated by the giving of a note for \$7.75 the amount of the delinquent payments. By the terms of the policy and the note the amount was a lien against the policy and was so endorsed on the policy. November 10 1930 the policy again lapsed for non-payment of premiums and no payments were made after said date. The insured died November 4, 1932.

The policy among other provisions contained the following: "If this Policy lapse for non-payment of premium after premiums have been duly paid for three full years or more, the Insured, without any action upon his or her part, will become entitled to non-participating Extended Insurance



2
for the respective term specified in the following table. The amount of insurance payable if death occur within said term shall be the same amount as that which would have been payable if this Policy had been continued in force, except as to dividend additions subsequent to the date of lapse.

If there be any indebtedness under this Policy, such indebtedness will be deducted from the the Cash Surrender Value, or the term of the Extended Insurance or the amount of the Paid-up Life Policy will be reduced to such term or amount as the net single premium value of the respective provision reduced by such indebtedness shall provide according to the mortality table hereinafter specified."

The schedule for extended insurance as incorporated in the policy provided that if the premiums had been paid four full years the policy without action by the insured would be carried for the face of the amount for two years and forty one weeks. There were other options but insured did not exercise any of them.

The trial court held that the policy was good as extended insurance for two years and forty one weeks and insured having died within that period the four hundred dollars was due the beneficiary less the amount of the note for \$7.75.

In this the court ignored the policy provision that if there was any indebtedness the term of the extended insurance would be reduced from that set forth in the schedule in the policy to such term as the net single premium value of the policy reduced by the indebtedness would provide according to the mortality table specified in the policy. The evidence shows that on the date the policy lapsed the value for extended insurance was \$13.15. Deducting the debt of \$7.75 from such value and there was, on the date of the lapse of the policy \$5.38 to pay for extended insurance. The evidence further shows that \$5.38 would at age of insured purchase extended insurance for the face of the policy ~~or~~ for a period of approximately sixty weeks. Insured lived for a longer period than sixty weeks following the lapse of the policy and therefore

the extended insurance had expired prior to her death.

The judgment of the Circuit Court is reversed

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IN THE
APPELLATE COURT
OF ILLINOIS
FOURTH DISTRICT

Frances Sursa
Appellee.

vs.

City of Centralia,
a Municipal Corporation,
Appellant.

Appeal from the
Circuit Court of
Marion County.

Murphy J.

287 I.A. 638¹

Appellee instituted this suit against appellant to recover damages for personal injuries alleged to have been sustained when she fell on a sidewalk in said city.

The complaint contains two counts, the first charges general negligence in permitting the sidewalk at the place of the accident to become and remain cracked, broken, uneven and unstable, the second count is substantially the same as the first with the additional allegation that at the time and place of the accident the sidewalk had an unusual collection of snow and ice thereon which had collected by reason of the defective condition and was thereby made extra-hazardous.

Appellant's answer denied the charges of negligence and a trial with a jury resulted in a verdict and judgment for appellee for four hundred dollars.

The only grounds relied upon for a reversal are that the verdict is not supported by a preponderance of the evidence and is against the law.

The accident occurred about 10 A.M. December 24, 1934. It had been raining and sleeting and there was a heavy coating of ice on the walks. The accident ^{occurred} on the west side of Chestnut Street in said city. The walk was made of limestone slabs and at the place of the accident the west half of the walk was a pair of street doors which opened to an entrance into the basement of an adjoining building. The limestone slab opposite these doors is where the accident occurred. This slab is described as being 4 inches thick, four feet eight inches east and west and four feet

north and south.

Appellee testified that as she approached the scene of the accident she was walking slowly and carefully near the center of the walk and that as she stepped onto the stone above described it gave way and she was thrown on the walk causing the injury.

Alvin K. English, witness for appellee, testified that at the time of the accident he was operating a tavern near the scene of the accident, that the stone on which she stepped and fell was a little rough and worn, had cracked places in it, that the stone was set on a foundation and was hollow under it, that in the month of August prior to the accident he notified the mayor that this walk was in a defective condition, that he and the mayor inspected it, found a small part of the stone was broken off and when on it, it would go down and that in freezing weather ice and snow accumulated in the depressions on the surface. He did not see appellee fall but saw her lying on the slab described and assisted her to the ambulance.

Harry Trainor, testifying for appellee, stated that the slab was "teetery" that when he stepped on one side it would go down and then step on the other side and it would go up an inch and a half to three inches. That there were broken places all around, the surface sloped toward the center. He also testified as to the general icy condition of the walks on that date.

Irvin Taylor testified that for a year he had observed the walk at this point, that the slab in question moved up and down, that it sloped toward the building, that after it snowed or sleeted the low places on the surface filled with snow and ice. He corroborated English on the point that the mayor had inspected the walk in August prior to the accident.

Reuben Kelly testified that he had observed the walk for more than three months prior to the accident, that it had low places in the surface, was cracked, that he saw appellee fall, that she was moving slowly and carefully.

Holly Stover, street superintendent for appellant, testifying for the city, stated that in July following the accident the surface was covered with a material known as Workalite that this was done to bring the surface to an even level that at that time the foundation of the slabs were solid. He did not know of the condition of the walk the previous December.

James E. McClelland a city commissioner in 1934 testified the slabs were solid.

John Laugenfield who succeeded McClelland as a city commissioner in May 1935 testified that in May 1935 the stones had become worn and cupped that they used Workalite to give it an even surface. Glenn Stover, the foreman in charge of the resurfacing of the walk in 1935, testified the surface was worn and when tested with a straight edge there were ^{places} two or three inches below the level.

John McNeil, Mayor in 1934 denied having inspected the walk in question in company of Mr. English.

Other witnesses testifying for appellant stated that all the sidewalks in the city were icy and difficult to walk upon at the time of the accident.

Appellee's evidence strongly supports her theory that the slab upon which she stepped had an insufficient foundation that permitted it to rock or move when she stepped upon it. The evidence also shows that there were depressions on the surface which were of sufficient depth and breadth to cause an extra accumulation of water and ice.

Under such evidence it became a question for the jury to determine whether appellee's fall was caused by the moving rocking or teetering of the slab, the extra-hazardous condition created by the ice and water accumulating in the depressions on the surface or whether it was caused as appellant contends by the general icy condition of the walk.

A city is not an insurer against accidents to

pedestrians travelling upon its sidewalks. *Graham v. City of Chicago* 346 Ill. 638 *Boender v. City of Harvey* 251 Ill. 228 and is not liable for injuries resulting from general slipperiness of its streets and sidewalks due to the presence of ice and snow which have accumulated as a result of natural causes and which do not actually obstruct traffic, *Graham v. City of Chicago*, supra, but in this case there is sufficient evidence to support appellee's contention that the slab on which she stepped, moved or "teetered", thereby causing her to lose her balance and throwing her to the ground. Such condition if believed by the jury would have been sufficient in itself to have caused appellee to fall even when no ice or sleet was present. The jury having found for appellee the court would not be warranted in saying that the ice and sleet caused appellee to fall and that the defective condition of the slab had nothing to do with it.

The evidence supported the verdict and the judgement of the lower court should be affirmed.

Judgment affirmed.

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